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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 752

JOHN W. GARDNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
Appellant-Respondent,

v.

THE STATE OF ALABAMA, for and in Behalf of and as Trustee for the DEPARTMENT OF PENSIONS AND SECURITY OF THE STATE OF ALABAMA, ET AL.,
Appellee-Petitioner.

(This Petitioner is Joined by Sarah Harton, Emma Morton, Louise Jones and Addie Kelly as Additional Petitioners.)

United States Court of Appeals for the Fifth Circuit,
No. 24,468.

Petition of the State of Alabama to Review the Decision, Directive or Order of Honorable John W. Gardner, Secretary of the Department of Health, Education and Welfare of the United States, Dated January 12, 1967.

United States Court of Appeals for the Fifth Circuit.
No. 24,561.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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In addition to the jurisdictional questions discussed in which we contend that the United States District Court, Northern District of Alabama, had jurisdiction and that the Court of Appeals erred in holding otherwise, we think the reasons relied on for allowance of the writ, as far as these questions are concerned, have been amplified in the foregoing sections of this petition, and we adopt with leave of this court such amplification particularly set out under section or subsection (e) above 35

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JOHN W. GARDNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
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To the United States Court of Appeals for the Fifth Circuit.

The State of Alabama, for and in behalf of and as Trustee for the Department of Pensions and Security of the State of Alabama (and Sarah Harton, Emma Morton, Louise Jones and Addie Kelly added as parties plaintiff in the action in the United States District Court, Northern District of Alabama, Southern Division, suing for

themselves and for a class, all the beneficiaries under the State's welfare programs, by an amendment to the complaint in the United States District Court, Northern District of Alabama, Southern Division, from which one of these two consolidated cases originated [amendment appearing at page 70 of the record on appeal to the United States Court of Appeals for the Fifth Circuit from the District Court]) prays that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Fifth Circuit, entered in the above styled cause on August 29, 1967.

1.

(a) **A Reference to the Official and Unofficial Reports of the Opinions Delivered in the Court Below.**

No formal opinion was written by the District Court in the case before it. The judgment of the District Court (including findings of fact and conclusions of law) was rendered February 3, 1967, is shown at page 77 of the printed record and is appended hereto as Appendix A. The order or directive of the Honorable John W. Gardner, Secretary of Health, Education and Welfare of the United States, dated January 12, 1967, cutting off the state's welfare funds is appended as Appendix B. The opinion of the United States Court of Appeals in the two cases, dated August 29, 1967, is appended as Appendix C. It has not been officially reported. On August 29, 1967, the Court of Appeals rendered judgment vacating and setting aside the preliminary injunction of the District Court and decreeing that the order of the Secretary of Health, Education and Welfare be enforced in accordance with the views expressed in the opinion of the Court, Transcript of Record, Volume II, pp. 146-148. Such judgment or judgments were rendered in both of the two cases, consolidated for hearing in the Court of Appeals.

(b) **A Concise Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked:**

On January 12, 1967, the Secretary made an order or directive for the cutting off of all welfare funds under the State's welfare programs, shown in Volume II, Appendix to the Brief of the Appellant-Respondent, at p. 273. The State filed a complaint on January 13, 1967, in the United States District Court, Northern District of Alabama, Southern Division, and moved and prayed for a preliminary injunction. Also, on or about January 16, 1967, the State filed a motion with the Secretary himself for postponement of the effective date of the action taken by him on January 12, 1967, cutting off federal financial assistance. This the Secretary was authorized to grant under § 705, Title 5, United States Code, but he refused the stay. Thereafter, the State obtained a setting of the matter for a hearing for the preliminary injunction in the District Court. On February 1, 1967, this hearing was held, affidavits were submitted as evidence, as shown by the record, a copy of the proceedings on the administrative hearing before a hearing examiner in Washington, D. C., was introduced, and the case submitted. This resulted in the judgment or decree of February 3, 1967, above mentioned, page 77 of the printed record, enjoining the Secretary from cutting off financial assistance to the State and the State Department under Alabama's welfare programs. An appeal was taken in the Court of Appeals, the Secretary insisting principally that the District Court had no jurisdiction to review the action of the Secretary following the administrative hearing, or to enjoin the Secretary's action. The Secretary, by motion to dismiss and brief in the Court of Appeals, contended that § 1316, Title 42, United States Code, vested jurisdiction to review the Secretary's action under all five of Alabama's welfare programs solely by a direct proceeding in the United States Court of Appeals for the Fifth Circuit. We contend

otherwise. That section, **if applicable**, provides for review by a petition in the United States Court of Appeals within sixty days from the Secretary's action and accordingly, as a matter of precaution, the State filed on or about February 18, 1967, its petition for a review (petition without exhibits shown at p. 10 of the Supplemental Transcript of the Record, and also shown in appendix to brief of the State in the Court of Appeals). The exhibits to the petition, omitted from the place in the record at which the petition is shown, because otherwise shown in the record, are outlined (with citation to the printed record) at page i of appendix to the brief of the State. Subsequently, on motion of the State to docket the case made by the petition as a separate proceeding and to consolidate it with Case No. 24468 (the Appeal from the District Court) [Supplemental Transcript p. 7], this motion was granted and the two cases consolidated [Supplemental Transcript p. 15]. The petition to review in the Court of Appeals was filed to guard against a possible holding (which has now occurred) that only the Court of Appeals had jurisdiction, and in order to attempt to insure that Alabama and the beneficiaries under its welfare programs would obtain a review by some proceeding. On September 25, 1967, Honorable Walter Gewin signed and filed an order [Supplemental Transcript p. 16] staying the mandate of the Court of Appeals and enforcement and execution of its judgment pending review by this Court on petition for certiorari, shown at page 16 of the Supplemental Transcript. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

(i) The date of the judgment or decree sought to be reviewed and the time of its entry.

The judgment or judgments of the Court of Appeals sought to be reviewed are dated and entered on August 29, 1967.

(ii) The date of any order respecting a rehearing and the date and terms of any order granting an extension of time within which to file petition for certiorari: None.

(iii) The statutory provision believed to confer jurisdiction on this Court to review by writ of certiorari has already been stated (28 U. S. C., § 1254 (1)).

(c) **Questions Presented for Review.**

A.

(1) Whether a federal court of appeals has exclusive jurisdiction "by implication" to review a determination by the Secretary of Health, Education and Welfare for which no authority to review is expressly granted by 42 U. S. C., § 1316, so as to preclude jurisdiction in a district court to review such determination under the Administrative Procedure Act.

(2) Whether the absence of jurisdiction by a court of appeals to review a determination by the Secretary of Health, Education and Welfare to discontinue payment of assistance under one program of the Social Security Act renders statutory review in the Court of Appeals of determinations as to other programs "inadequate".

(3) Whether a federal court of appeals has exclusive jurisdiction under 42 U. S. C., § 1316 and section 603 of the Civil Rights Act of 1964 to adjudicate the validity of regulations issued by the Secretary of Health, Education and Welfare so as to preclude the exercise of jurisdiction by a district court of a suit for a declaration of the invalidity of such regulations on the ground that they exceed the Secretary's statutory authority.

(4) Whether private individuals who are recipients of financial assistance administered under the Social Security Act are "persons aggrieved" within the meaning of section 603 of the Civil Rights Act of 1964.

B.

(1) Whether the action of the Secretary in cutting off Federal financial assistance in this case transcends the authority given him, or the Department of Health, Education and Welfare, under the Civil Rights Act of 1964.

(2) Whether said action transcends the regulations of the Department of Health, Education and Welfare.

(3) Whether the regulations of the Department of Health, Education and Welfare in the respect involved in said action were consistent with the objectives of the act or acts providing financial assistance.

(4) Whether requiring the cutting off of said financial assistance was consistent with the objectives of the act or acts providing for such financial assistance.

(5) Whether requiring the assurance that third parties would desegregate all of their facilities was consistent with the objectives of the act or acts providing financial assistance.

(6) Whether cutting off of Federal funds for direct payments to beneficiaries was warranted.

(7) Whether it is within the scope of the Civil Rights Act, and the objectives thereof, to put into effect a regulation or requirement that the State must eventually cause all discrimination by necessary third parties to end, even though the State acts in good faith in attempting to induce or persuade such third parties to end all discrimination.

(8) Is an interpretation by the Department of Health, Education and Welfare that a private physician upon whom the State must rely desegregate the physician's waiting room as a condition to receiving Federal funds, even though the physician furnishes adequate waiting rooms, or rest rooms, and furnishes the same medical examination or treatment to all alike.

(9) Can the State be put under an obligation, as a condition to using Federal funds to pay the salaries or wages of employees who are instrumental in finding children and placing them in church homes (private), to require that such church homes end all desegregation in the acceptance of children whom they will support (where any such church home charges neither the State nor anyone else a single penny for the support and care of the child).

(d) **The Constitutional Provisions, Treaties, Statutes, Ordinances or Regulations Which the Case Involves:**

The regulations involved are shown in the record, Volume II, Appendix to the Secretary's Brief in the Court of Appeals, page 248, entitled 45 C. F. R., Part 80. It is appended hereto as Appendix D.

A particular portion of the Regulation, including a form of assurance required in implementation thereof, is quoted below under subsection (e). This involves an assurance required of the State to the effect that third parties (such as physicians, nursing homes, church homes, etc., although not specifically named in the regulation or the assurance) will not discriminate.

Title VI of the Civil Rights Act of 1964 is directly involved in this case, 42 U. S. C., § 2000d.-2000d.-4 (78 Stat. 252-253). It is appended as Appendix F.

Also involved is § 1316, Title 42, U. S. C., also contained in Appendix F.

(e) **A Concise Statement of the Case Containing the Facts Material to the Consideration of the Questions Presented.**

Alabama's five welfare programs are outlined in the District Court's decree granting the injunction (page 83 of the printed record) and are as follows:

	Social Security Act	U. S. C. A.
Title I	(Old Age Assistance and Medical Assistance to the Aged)	Title 42, § 301-306
Title IV	(Aid to Dependent Children—Alabama Program)	Title 42, § 601-606
Title V	Part 3 (Child Welfare Service)	Title 42, § 721-728
Title X	(Aid to the Blind)	Title 42, § 1201-1206
Title XIV	(Aid to the Total and Permanently Disabled)	Title 42, § 1351-1355

There is no express provision for a judicial review of the cutting off of federal funds in connection with the program under Title V, Part 3, of the Social Security Act, Title 42, Sections 721-728, Child Welfare Service, under Section 1316, Title 42; hence, our contention, among others, that this Court has no jurisdiction to entertain a petition to review the action of the Secretary as it relates to such a program, that a review under that program is within the exclusive jurisdiction of the District Court under the Administrative Procedure Act, 5 U. S. C. 705 (formerly Section 1009), a catch-all statute insuring a review in a Federal Court of competent jurisdiction where no other method of review is provided by statute or where the review provided by a statute is **inadequate** (necessarily meaning in such case a District Court). We contend also that the District Court has jurisdiction of the action filed therein as to all the programs. These contentions are developed elsewhere.

The transcript of the administrative hearing in Washington and the evidence taken therein, set forth in Volume I of the Appendix to the Brief of Appellant-Respondent, briefly describe the five programs, the plans describe them in detail (These plans were a part of the record in the District Court as well as on the administrative hearing in Washington, and are a part of the record in the United States Court of Appeals, although not printed—the Appendix to the State's Brief in the Court of Appeals, appended here, contains a brief outline of some of these factors). In that part of the volume which is characterized

as the Manual for Administration of Public Assistance, Part 1, there is set forth on page IV-13 and on IV-14 a provision for regular payments directly to the welfare recipient by mail under four of the five programs, viz., Old Age Assistance (described under Alabama law and regulation as Old Age Pension), Aid to Dependent Children (ADC), Aid to the Blind (AB), and Aid to Permanently and Totally Disabled (APTD).

Under the first of the above mentioned programs, the Old Age Assistance, persons 65 years of age and over who otherwise qualify with respect to residential and need requirements (from the standpoint that they do not have the income or sources sufficient for their support—the amount determined to be paid to each person is gauged by such standards as are set forth in the plan) receive these payments directly without regard to the physical condition of such person. If there is no discrimination as between white and Negro recipients in determining eligibility, it would seem logical that under no condition should the federal funds which make up a substantial portion of these "pensions" be cut off. Yet all through the record of the administrative hearing, questioning by the Assistant General Counsel of HEW, there stands out an indication that if the employees of the State Department are not desegregated, in the sense that a sufficient number of Negro employees interview white recipients to determine eligibility and need, or vice versa, this constitutes discrimination under the Civil Rights Act, the regulation and HEW's interpretation thereunder (the same situation exists as far as aid to dependent children is concerned).

Direct payments of this nature made for aid to the blind, and to the totally and permanently disabled, can be made only upon the determination of a physician, who certifies the condition of the recipient. As to these, it is claimed by the officials of HEW, those who interpret and

administer the Civil Rights Act, that if the physician does not have a desegregated waiting room or all desegregated facilities, in making the examination (and only one may be required), there would be such discrimination if the Alabama Department made any payment to the physician as would violate the Civil Rights Act, the regulation, and the assurance required to be signed by the State Department. This is an example of the payments to third parties in order to provide medical assistance to the aged, the blind, the disabled, and needy children, which the HEW regulation and the assurance form required to be signed proscribe.

These programs, according to the State plans, also provide benefits, involving third party payments, which may be outlined briefly as follows:

(1) Title I, Social Security Act (Old Age Assistance and Medical Assistance to the Aged), Title 42, § 301-306, U. S. C. A. Under this each eligible person over 65 years of age, in addition to direct payment or pension, may receive medical assistance by way of hospitalization, for a limited period (thirty days at the time of the administrative hearing in October, 1965), and post hospital limited medical assistance for such limited period, upon certification by a physician of the beneficiary's choice. The State paid (and now pays) the doctor for the examination ($5), and also paid a limited amount for the hospitalization (this was before medicare), and now the State pays only $40 for those entitled to receive medicare (the deductible amount under medicare), a substantial portion of all such payments being made up with federal funds. Also upon certification of a physician that nursing home care was needed, the patient would be placed in a licensed nursing home if requested, the nursing home being paid by the State (including federal money). If the family preferred to take care of the recipient, a pay-

ment would be made to the recipient for that purpose.[1] All hospitals and nursing homes are licensed by the Health Department and not the Alabama Department of Pensions and Security. Payment for nursing home care is another example of payment to a third party facility, which the Federal Department claims cannot be used,

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[1] Pertaining to the nursing home situation (the great majority of the licensed nursing homes will accept only white patients, with only one accepting both races [Administrative Hearing Transcript pages 94-95, 75; pages 115-116, 96 of Appendix to Appellant-Respondent's Brief]) and the family situation, Commissioner Ruben King, Head of the State Department, testified in part:

"A. No, I don't know how many were for colored. But I want to say I know what your inference is, because of only 13 colored nursing homes, as I stated to you. Now as I stated before, I know of no Negro who has ever applied for nursing home care that has not been able to get into a nursing home. And I think it is a credit to the Negro race that they want to keep their old people at home, because we feel like in many cases, even in regards to whites, that these old people would do better if they were in their own homes and were receiving nursing care in their own homes instead of being in a nursing home.

Q. You say it would be equally better for whites also?

A. Yes, sir, I think it would be better in many cases. I think that the nursing home care is growing at an alarming rate, not only in Alabama, but throughout this Nation, and I think the Welfare agencies in this Nation ought to concentrate on more people staying in their homes and receiving nursing care in their homes. I think that the people would probably live longer and I think it would be better for this country, certainly cheaper."

* * * * * * *

"Q. Mr. King, during your whole tenure, in your experience as the head of the State department, has there ever been an instance to your knowledge where a person of the Negro race who is eligible to go into the nursing home and who we will say who expressed a desire to go, his family did, was there ever a failure to put them in there because there was no nursing facility?

A. No, sir. We have adequate bed facilities for Negroes in the State. I would like to point out again that all of these are privately owned institutions. They are not run by the State, and if the need was there for the Negro it would be met by private enterprise just like it had been in all other instances."

however necessary, unless that facility is completely desegregated.

(2) Title IV, Social Security Act (Aid to Dependent Children—Alabama Program), Title 42, § 601-606, U. S. C. A. This involves only direct payments.

(3) Title X, Social Security Act (Aid to the Blind), Title 42, § 1201-1206, U. S. C. A. In addition to direct payments, nursing home care, or family care in the alternative, as above described, can be provided.

(4) Title XIV, Social Security Act (Aid to the Total and Permanently Disabled), Title 42, § 1351-1355, U. S. C. A. Nursing home care may be provided in addition to direct payments, with like certification and handling as above described.

With reference to the Child Welfare Service program, Title V, Part 3, Social Security Act, Title 42, U. S. C. A., § 721-728, this involves services to needy children essentially performed only by third parties. One of these is placing the child in a child care institution, for the most part church homes for children, maintained by various churches. It also involves third party services such as day care for children whose parent or parents are unable for any reason to take care of them during the day. These day care service functions are performed by private businesses, some of which accept only white children. As to the day care service, money is paid to the day care business (made up in substantial part by federal money), but as to the child caring institutions such as the church homes, no money is paid to the institution by the State, and no federal funds used, for the care and housing of the child. The only federal money expended would be to pay salaries of case workers assisting in finding the child, determining the child's needs and placing the child in the institution. Mr. King, State Commissioner, testified rela-

tive thereto.[2] (Pages 80-82 of the Hearing Examiner's Transcript; pages 101-103 of the Appendix to Appellant-Respondent's Brief.)

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[2] "A. Well, they know, the Federal officials know as well as I do. And in the conference I have discussed with them the thing that bothers us and that is particularly in the field of child care and institutions where no Federal money or State money is going to pay the money for the care of our children and yet they tell us the mere fact that they pay half the salary of case workers, of some social worker in the home, that these homes must integrate. They start off on the premise that a child is better off in an integrated——

Q. You are talking about the Federal officials?

A. The Federal officials, particularly those in the child welfare, start off on the premise that children do better in an integrated society and I disagree with them.

Q. Let's take the institutions themselves. Now what are we talking about?

A. We are talking about your Methodist homes, your Baptist homes. We are talking about your Presbyterian homes, your church homes. These people are not charging us under the State plan one penny for taking care of our children and yet we have told the Federal officials time and time again what is going to happen to these children if we have to integrate these facilities. Our job—and I want to say this, Mr. Barnes—my job as Welfare Commissioner is to see that the needy people in the State of Alabama get help. And I want to know, and I would like to bring it out in this hearing today, I want to know whether or not the Federal Government is more interested in integration or seeing that needy people get help.

I live down there with these people and I see the poor and hungry and the children that come in every day, in many cases who are half beaten to death and have burns, and my interest is in that child and to see that that child gets help. That is the reason I went to Montgomery. I am interested in those children.

Q. When you say child, you mean both white and Negro?

A. That's right.

Q. Do you have any, or do you have any Negro church homes?

A. We have some that are serving families, yes, sir, Negro children.

Q. Do you also——

A. We have some who serve in both. We have some that serve only white and some that serve only Negro, and I believe we have some that serve both.

Q. Both?

A. Yes, sir.

Q. You are talking about in the State of Alabama?

A. In the State of Alabama."

The Child Welfare Service program is the one pertaining to which no provision is made under Section 1316, Title 42, for review by a United States Court of Appeals, and the services performed involve purely payments to the third party (as in payment to day care businesses), or only payment of the salaries to employees of the Department (in case of placing children in church homes which charge the State Department nothing by way of state or federal money).

On the hearing for preliminary injunction, several affidavits were introduced in behalf of the plaintiff, the State, all of which are not shown in the reproduced record, but all of which are part of the original record in this Court. One affidavit, or a portion of one, demonstrates that irreparable injury would result from the cutting off of Federal funds on page 101 of the printed record. There it appears that Federal funds actually expended at the end of the fiscal year prior to the hearing, amounted to approximately $95,000,000, whereas State funds amounting to approximately $31,000,000 during the same period were expended. The budget for the fiscal year to end September 30, 1967, was approximately $103,000,000 of Federal funds and approximately $35,000,000 of State funds.

Appearing in the exhibits and record, although possibly not in the printed or reproduced portion, is the fact that approximately 200,000 persons in Alabama receive benefits under Alabama's welfare programs.

In question is the validity of that portion of the Federal Regulation, 45 C. F. R. 80.3, which is contained under (b), and which is set out in part on page 49 of the printed record and the validity of that portion of the form which is set out on page 50 of the printed record, with particular reference to the requirement of an assurance that the State agency will take such steps as necessary to assure that any other agency, institution or organization participating in

the program through contractual or other arrangements, will comply with the act and regulation. The validity vel non of the requirements of such an assurance relates principally to that portion of Section 602, Title 6, of the Civil Rights Act contained in the first sentence thereof as follows:

> Sec. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of Sec. 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability **which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.**

The pertinent portion of the form, DB-FS-5022 is as follows (Page 158 B, Appendix to the Secretary's Brief):

> **4. Other Agencies, Institutions, Organizations and Contractors.**
>
> The State agency **will take** such steps **as necessary to assure that any other agency, institution or organization** participating in the program, through contractual or other arrangements, **will comply with the Act and Regulation.** [Emphasis ours.]

This involves the third party payment question, one of the primary issues between the parties in this case.

We introduced evidence through the State Department's sole witness, Mr. Ruben King, the Commissioner, at the administrative hearing, that private physicians have rendered and are rendering treatment to Negroes as well as white people, giving them all the same treatment, and even providing places for them to sit, but that many pri-

vate practitioners (who receive only $5.00 per person) have refused to desegregate their waiting rooms and that in some counties, to say the least, where there was only one doctor (a white doctor), this would deprive the needy poor people of examination if as a condition to such treatment there must be a desegregated waiting room so that the poor sick people might be able to socialize while they are waiting for service.

Pertinent portions of the evidence given by Mr. King on the physician aspect of the case are set out both in the printed record and the Appendix to the Secretary's Brief (Printed record, pp. 51-53, Hearing Transcript, pp. 76-80, Appendix to Appellant-Respondent's Brief, Vol. I, pp. 76-80).

Pertinent excerpts from the evidence pertaining to the placing of children in church homes in the Child Welfare Services program have been set out in footnote in the Statement of the Case. The situation pertaining to other third party services (commonly referred to as vendor services) has been described, such as the use of nursing homes and day care centers.

Concerning institutional care, the Government's chief witness at the administrative hearing stated the position of the Government in the interpretation of the regulation and the assurance form required as follows (Miss Margaret A. Emery, Vol. I, Appendix to the Secretary's Brief, pp. 68-69):

> "Q. Then, in such a case, has the Department interpreted it this way and so instructed the states that the institution must agree or desegregate even though it does not receive any federal funds whatsoever?
>
> A. Whether or not the institution is receiving federal funds directly or indirectly is not the determining factors as to whether the state agency must require compliance under Title VI of the Act.

For example, if the children that are being placed by the state welfare department had been placed by the court in the custody of the state welfare department, then the state welfare department is responsible for providing to those children services whereby there will be no discrimination in their treatment. And if the state, under those circumstances, would not be able to use an institution which was completely segregated, it would be responsible for assuring compliance in all situations of the children who——

Q. You mean even though the state in its plan did not pay out any federal money to the institution?

A. That is correct. As I said, as an illustration I am using the children who are in the legal custody of the state welfare department."

The Federal Department's position pertaining to the meaning of the regulation and the assurance form on the physician aspect is illustrated by the testimony of Miss Emery as follows (Appendix, Vol. I, pp. 64 and 78):

"Q. May I ask if any of the discussions with which you are familiar, whether you heard it discussed or stated to the representatives of state departments, in any way, that for example under the assurance that we have given to take such steps as necessary to make the institution or agencies or persons applying, **it has been stated that for example the doctor must have a desegregated waiting room.**

A. Have I heard that stated; is that your question?

Q. Yes, ma'am.

A. Yes.

Q. All right.

A. This is also stated in writing, but wherever the state plan provides for use of private physicians, the private physician—and this is true in many states—the private physician must give the state agency as-

surance that there will be no discrimination in the treatment and the services provided to recipients of public assistance funds.

Q. That has been interpreted even to segregated waiting rooms?

A. Those are included as being within the purview of the Act."

* * * * * * *

"A. . . . But my understanding is that many states would prefer to let the individual recipient choose the physician or the arrangement for the medical care that he wished to use, but when he does that the physician is under the purview of Title VI and the Department regulations, if that arrangement is included in the state plans for public assistance."

Pertaining to the refusal to sign the form previously referred to and shown by the record, contained in the "Handbook", the State Department's position is shown on page 92 (Secretary's Appendix) in the testimony of Commissioner King on the administrative hearing:

"A. We stated—I stated to several Federal officials that we were willing to sign a compliance, that we would comply with the Civil Rights Act, that the State of Alabama, and I as Commissioner, would have a right to interpret, that as Commissioner I had as much right to interpret whether or not the rules and regulations were within the intent and scope of the law as some official here in Washington.

Q. You made a statement of what you stated, what you were willing to sign. Are you still willing to sign?

A. We are still willing to sign a statement that we are willing to comply with the law.

Q. You are talking about the Civil Rights Act of 1965?

A. Yes, sir."

There has never been a statement by the Government that such an assurance would be sufficient and the difference between what the Government absolutely required and what the State agency was willing to do involves a principal issue.

While there is no time limit set, the assurance that the State agency will take such steps as is "necessary" to assure compliance by third parties is at least a commitment that all segregation of every service, as interpreted by the Federal Department, on the part of third parties will end within a reasonable time. That this is true is clearly demonstrated by the testimony of Miss Emery on the hearing in Washington where she says, having referred previously to the "Handbook" and the regulation (pp. 43 and 44), Appendix to Secretary's Brief):

> "A. This is correct. The state plan material is required to set forth the situation in the state, and the state plan and time limit, the purpose of that and the other regulation was to provide **assurance that within a reasonable time the state would not only take steps it would accomplish compliance** with the Civil Rights Act, but there is no specific deadline set forth in the regulations nor in the handbooks of the two bureaus" [Emphasis ours].

It appears now that the government in brief and on oral argument, as shown by the opinion of the Court of Appeals, states that all that the state has to do is to try or exercise good faith, especially as far as third parties are concerned (a position that was certainly not taken in the administrative hearing), then the state should not be required to sign a rigid form that it will take such steps as to eventually assure that there will be no discrimination by third parties, or otherwise, and we are not now here to discuss whether discrimination

against Negroes should be allowed by refusal of a physician to treat Negroes (this has not occurred). We are discussing whether the State should be required to assure that the physician, for example, will not have a desegregated waiting room even though the physician furnishes a waiting room for both white and Negro and gives the same service. If the State is required only to act in good faith, all well and good, but if so, it should not be required to give assurance that it will do more. Thus, the Court of Appeals should not have held that the State was not in compliance, since the writing of the government's brief, almost two years after the administrative hearing, was the first intimation the State had was that all it had to do was try, persuade or act in good faith.

We construe the opinion of the Court of Appeals as holding that if the State does act in good faith in the respects mentioned in the opinion, the Department of Health, Education and Welfare will not be empowered validly to cut off the funds, even if the State eventually fails, though exercising every reasonable effort to obtain "compliance" by third parties. On this we beseech clarification.

There is another vital question involved and that is that although the Civil Rights Act provides that the withholding of financial assistance or the cutting off thereof shall be limited to the particular **program or activity or part thereof** (see the Act itself) in which the discrimination is practiced,[3] the assurance required by HEW may

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[3] Concerning that part of § 602 which provides that the termination or refusal of assistance shall be limited in its effect to the particular program or part thereof in which such noncompliance has been found, Senator Javits said [p. 62 BNA, "Civil Rights Act of 1964"]:

> "Let me give the Senator an example, because we discussed the question in great detail. We discussed in great detail the situation in which a contractor on Government work—that is, work in which the United States puts up

well be and probably will be construed as applying to all of the programs of a particular state agency or at least a complete program (as distinguished from a part thereof). Relative to that question, we point to the testimony of Miss Emery on **redirect** examination (pp. 72, 73, Appendix to Appellant-Respondent's Brief):

> "Q. Similarly, if a state submitted a statement of compliance which is adequate for purposes of meeting the requirements with respect to, let's say, the child welfare services under Title V, Part 3 of the Social Security Act, the fact that it didn't submit such a statement with respect to its public assistance programs would be immaterial as far as receiving child welfare services grants?
>
> Mr. Barnes: We think that is an interpretation. We object to it. They are talking about the assurance would have to be given.
>
> Hearing Examiner Irwin: If that is the objection, I will overrule it.
>
> Mr. Yourman: Would you answer the question?
>
> (The reporter read the question.)
>
> The Witness: This is correct in some situations. For example, in certain states the child welfare program is administered by a separate agency and there is a separate statement. The usual pattern **is where the programs are administered by the same agencies you have one Civil Rights branch which is applicable**

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some of the mor... Assume he is a road contractor and was discriminati... in his business against hiring Negroes, but he was not ...scriminating on that particular job.

I state for the Record that because he was discriminating generally, but was not discriminating on that job, **we could not cut off his funds** because the statute which permitted the Federal Government to put up its share of the money did not apply to the contractor's general business operations. **It applied only to the construction of the road"** [Emphasis ours].

to both child welfare and public assistance" [Emphasis ours].

For example, both the Secretary's order and the evidence show a substantial part of the State's welfare programs involve direct payments, payments **mailed** directly to the recipients, involving no possible discrimination. This is certainly a "part" of a program in which no discrimination exists, and this should have been taken into account in the decision of the Court of Appeals.

Another vital question is whether it was the intention of Congress in a case of this kind that funds be cut off at all to the prejudice and desolation of innocent beneficiaries.

§ 602 of the Civil Rights Act, the provision of Title IV which empowers the defendants to issue rules and regulations, provides expressly that any such rules, regulations or orders issued "shall be **consistent with achievement of the objectives** of the statute authorizing the financial assistance in connection with which the action is taken" [Emphasis ours]. It was for the specific purpose of prohibiting the issuance of regulations which would apply to authorize the withholding of financial assistance under, for example, programs for furnishing lunches for school children that the above quoted provision was included in this act. This is shown very clearly by the following statement of Senator Pastore (the floor leader in the Senate for Title VI) at p. 13936 of the Congressional Record of June 19, 1964:

> "Let me advise Senators that the failure of a district court to desegregate the schools will not jeopardize the school lunch program; it absolutely will not. Even if a community does not desegregate, that will not jeopardize the school lunch program—**unless in that particular school the white children are fed, but the black children are not fed**; and I refer Senators to page 33 of the bill, which states very, very

clearly: 'which shall be consistent'—in other words, the orders and rules—'shall be consistent with the achievement of the objectives of the statute authorizing financial assistance.'

"**We have a school lunch program, and its purpose is to feed, not to desegregate the schools; therefore, that would not be consistent.** But if a school district did not desegregate, it could no longer get federal grants, let us say, to build a dormitory—not unless it integrated; and a hospital could not receive 50 percent of the money with which to build a future addition unless it allowed all American citizens who are taxpayers and who produce the tax funds that would be used to build the addition, to have access to the hospital.

"So we must remember that **the shutting-off of a grant must be consistent with the objectives to be achieved. A school lunch program is for the purpose of feeding the school children. If the white children are fed, but the black children are not fed, that is a violation of this law.**" [Emphasis ours.]

This statement demonstrates what Congress meant by the term "discrimination"—that in the use of that term in § 601 of the Act, it was intended only that all children should be entitled to the benefits of the school lunch program, not to cause the "desegregation" of the schools in which funds received under such programs are used. It is evident that the use of the word "discrimination" in Title VI was used selectively.

If, as the floor leader for Title VI said (Senator Pastore), the act when applied to feeding children in school contemplated merely that all the children be fed, Negro and white, and in essence that the word "discrimination" as used in the act did not require that the children be integrated while being fed, then we do not see how the act can be construed as requiring that there be a min-

gling together in waiting rooms, or in nursing homes, or in institutions assuming the care of children. The purpose of these programs is to treat the sick, and to care for the poor, and so long as the treatment and care are provided for all, then there is no discrimination under such program within the meaning of the Civil Rights Act. Thus, the assurance required, the guaranty, in effect, that there must be absolutely desegregated waiting rooms or nursing homes or institutions for child care, goes beyond the scope of the Civil Rights Act.

We next quote from Senator Saltonstall of Massachusetts:

> "Furthermore, it is important to note that section 602 states that any rules or regulations established to effectuate the provisions of this title 'shall' be consistent with achievement of the objectives of the statute authorizing the financial assistance.' Thus, where Federal funds are used to feed needy children through a program which is operated on a segregated basis, **this section does not intend that the children be deprived of the food because the administrators of the program are violating the law.** However, we cannot justify the expenditure of Federal funds collected from all citizens on programs which are being administered in a way which clearly deprives some of them of the equal protection of the laws." [Emphasis supplied.] (110 Con. Rec.—Senate, Number 11, page 12263.)

Senator Saltonstall was, as we understand it, the Chairman of the Bi-Racial Senate Conference whipping the final version of the substitute into effect, as finally passed, and made the above statement shortly before the passage. This statement, we submit, is entitled to great weight.

We also quote from Senator Ribicoff:

> "The remedies provided by section 602 are withholding of assistance and any other means authorized

by law. In general, the consistent-with-the-objectives requirement would make withholding of funds a last resort, to be used only when other means authorized by law were unavailable or ineffective.

"To make that clear: The withholding of funds would be the last step to be taken only after the administrator or the agency had used every other possible means to persuade or to influence the person or the agency offending to stop the discrimination.

"Seventh. Looking first to the **'other means authorized by law,'** the agency could, for example, ask the Attorney General to initiate a lawsuit under Title IV, if the recipient were a school district or public college; or the agency could use any of the remedies available to it by virtue of its own 'rule, regulation, or order of general applicability.' For example, the most effective way for an agency to proceed would often be to adopt a rule that made the nondiscrimination requirement part of a contractual obligation on the part of the recipient. Then violation of such a requirement would normally give the agency the right to bring a lawsuit to enforce its own contract; or, **in the absence of a technical contract,** the agency **would have authority to sue to enforce compliance with its own regulations.** All of these remedies have the obvious advantage of seeking to end the **discrimination, rather than to end the assistance.**" [Emphasis supplied.] (110 Con. Rec. 6846-6847, daily ed., April 7, 1964.)

These examples, statements from responsible leaders of the Senate, illustrate that the cutoff of funds in cases of this kind, where innocent people will suffer by reason thereof, is a last resort; and Senator Ribicoff indicates that the Federal agency could and should adopt a regulation affording a remedy against discrimination and forcing a State agency, if accepting funds, to desist from any discrimination complained of, prior to the cutting off of

funds. The Civil Rights Act applies to every form of financial assistance by way of grant, loan or contract. For example, if a contractor with the Government practiced discrimination, the Federal agency involved might terminate the contract and cut off the funds, without being compelled to use other means. However, it is not consistent with the objectives of the Social Security Act that aid be withheld from those who do not have anything to do with compliance, such as the white and Negro beneficiaries. Thus, the beneficiaries should not be victimized and excluded from the aid which the law intended they should have.

(g) The Basis for Federal Jurisdiction in the Court of First Instance.

This has already been shown. We contend that the District Court had jurisdiction of the entire case, having judicial review under the Administrative Procedure Act, above mentioned, or if not the entire case, a part of the case, and that where the jurisdiction of the District Court may fail, the jurisdiction for direct review was vested in the Court of Appeals, of the Secretary's order.

(h) A Direct and Concise Argument Amplifying the Reasons Relied on for the Allowance of the Writ.

The United States Court of Appeals for the Fifth Circuit has decided important questions of Federal law, which have not been, but should be, settled by this Court.

A.

The court below erred in concluding the district court was without jurisdiction.

1. In order to conclude that the District Court was wholly without jurisdiction of the action against the Secretary, it was necessary for the Court of Appeals to

hold that the provisions of Section 603 of the Civil Rights Act and 42 U. S. C., § 1316, confer upon the Court of Appeals exclusive jurisdiction to review an order terminating the payment of federal funds under Title V (part 3) of the Social Security Act, which relates to Child Welfare Services.[4] Since the provisions for statutory review in the Court of Appeals (42 U. S. C., § 1316) do not provide for review of determinations by the Secretary relating to part 3 of Title V (Child Welfare Services),[5] the Court of Appeals reached its conclusion by holding that by granting jurisdiction to review determinations under other portions of the Social Security Act, § 1316, "vest(s) in this court **by implication** the authority to review the Secretary's order with respect to Title V (part 3).

A Federal Court of Appeals, having no general original jurisdiction like that of the district courts, has only such jurisdiction as "is specifically conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review." **American Federation of Labor v. National Labor Relations Board**, 308 U. S. 401, 404. The provisions of 42 U. S. C., § 1316, do not specifically

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[4] Title V of the Social Security Act is divided into four separate parts. Part 1 is titled "Maternal and Child Health Services" and is codified as 42 U. S. C., §§ 701-705; part 2 is captioned "Services for Crippled Children" and is codified as 42 U. S. C., §§ 711-715; part 3, providing Child Welfare Services, is codified 42 U. S. C., § 721-28.

[5] § 1316 of 42 U. S. C. provides for review in a Court of Appeals only of "final determinations" of the Secretary under § 304 (Title I of the Social Security Act, providing old age assistance), 604 (Title IV providing aid to needy families), 1204 (Title X providing aid to the blind), 1354 (Title XIV providing aid to the totally disabled), 1384 (Title XVI providing aid and medical assistance for the aged), and 1396d. (Title XIX providing medical assistance for the aged). § 1316 does not provide for any review of any action by the Secretary relating to Title V generally or to part 3 of Title V specifically.

confer jurisdiction in a court of appeals to review determinations or other action by the Secretary with respect to Title V of the Social Security Act. The opinion below holds nevertheless that the court of appeals has jurisdiction to review action of the Secretary terminating funds provided under Title V (part 3) because section 1316 makes provision for review by courts of appeal of determinations by the Secretary under **other titles** of the Social Security Act. As an additional reason for its conclusion that it had exclusive jurisdiction to review the termination of assistance under Title V (part 3) it cites the relationship between Titles IV and V of the Social Security Act. There is no basis in either the statutory scheme of the Social Security Act and the Civil Rights Act or in the pertinent decisions of this court for a conclusion that a court of appeals has "implied jurisdiction to review an order of the Secretary with respect to Title V" (part 3).

First, not only does section 1316 not contain any reference to review of determinations by the Secretary under Title V (part 3), but there is not even any provision authorizing the Secretary to terminate payments for Child Welfare Services under Title V (part 3). Plainly, therefore, the action of the Secretary under Section 602 of the Civil Rights Act in terminating assistance to Alabama under Title V (part 3) does not constitute "similar action taken by such department or agency on other grounds" within the intended meaning of Section 603 of the Civil Rights Act relating to judicial review. Since the Social Security Act does not contemplate or permit any action by the Secretary for the termination on a statewide basis of payments under Title V (part 3), there patently is no basis for a conclusion that it was intended by congress in 42 U. S. C., § 1316, to provide for review of a determination to discontinue payments for child welfare services.

Secondly, the conclusion of the court of appeals that it has statutory jurisdiction to review a termination of assistance under Title V (part 3) on the ground of a provision for its jurisdiction to review orders terminating assistance under other titles of the Social Security Act is inconsistent with decisions of this Court construing the scope of statutory review in the courts of appeals under similar statutes. In other similar statutes providing review by courts of appeals, provision often is made for review by a court of appeals of certain specific orders or types of agency action while omitting any provision for review of other similar agency orders or action. See **American Federation of Labor v. National Labor Relations Board**, 308 U. S. 401; **Abbott Laboratories v. Gardner**, ... U. S. ..., 87 S. Ct. 1507 (May 22, 1967). In no such instance has it ever been contended that simply because the agency action sought to be reviewed is taken under the same or related statutory authority as is other action for which review is authorized, the grant of jurisdiction to the court of appeals to review one type of action confers "implied" jurisdiction to review other agency actions for which review is not specifically provided.

A strikingly similar situation existed in **Abbott Laboratories v. Gardner**, supra. There, Section 701(f) of the Food, Drug and Cosmetic Act, 21 U. S. C., § 371(f), provided for jurisdiction in a court of appeals to review orders of the Secretary upon objections to regulations issued under certain specified sections of the Act, including Section 502(d), 21 U. S. C., § 352(d). It made no provision for review by a court of appeals of any action by the Secretary on a regulation issued under Section 502(e) of the Act, 21 U. S. C., Sec. 352(e). Both subsections (d) and (e) of § 502 of the Act dealt with similar subject matter (labels required to be affixed to certain drugs) and obviously any action taken by the Secretary under either subsection would have a similar effect upon drug manufac-

turers. Yet, it was not even suggested that, as the court below now holds in the present case, a court of appeals had exclusive jurisdiction to review an order relating to Section 502 (e) of that Act simply because of the existence of provision for statutory review of orders under Section 502(d) of the Act. Indeed, an implication of jurisdiction such as the court below finds would have rendered a decision in **Abbott Laboratories**, supra, wholly unnecessary. The same is true of the statutes involved in **Gardner v. The Toilet Goods Association**, ... U. S. ..., 87 S. Ct. 1526 (May 22, 1967), which provided for review by a court of appeals of regulations that deny petitions for listing, certification, or exemption of certification of color additives[6] but contained no provision for review of regulations defining the term "color additive". Certainly if "implied" jurisdiction to review exists in the present case it also existed in those cases.

Section 603 of the Civil Rights Act provides for a judicial review in accordance with section 10 of the Administrative Procedure Act, 5 U. S. C., § 703 (1966), in the case of agency action taken under section 602 of the Civil Rights Act which is "not otherwise subject to judicial review". Inasmuch as there is no statutory provision for a judicial review by the Court of Appeals of the Secretary's action in terminating child welfare assistance under Title V (part 3) of the Act, jurisdiction in the district court under Section 10 of the Administrative Procedure Act is available at least with respect to the action taken by the Secretary in terminating funds payable under Title V (part 3).

The fact that 42 U. S. C., § 1316 provides for review by the Court of Appeals of action by the Secretary in terminating funds under other titles of the Social Security Act

[6] Food, Drug, and Cosmetic Act, § 706(d), 21 U. S. C., Sec. 376(d).

does not make that jurisdiction exclusive if the remedy in the Court of Appeals is unavailable or inadequate. **Utah Fuel Company v. National Bituminous Coal Commission,** 306 U. S. 56; **United States v. Interstate Commerce Commission,** 337 U. S. 426; **Gardner v. The Toilet Goods Association,** ... U. S. ..., 87 S. Ct. 1526; 3 Davis, Administrative Law, § 23.03 (1958); 5 U. S. C., § 703 (1966). Since the Court of Appeals does not have and cannot acquire original jurisdiction to review the action of the Secretary in terminating assistance under Title V (part 3) and the only tribunal in which petitioners could obtain relief for a stay of the Secretary's action in terminating assistance for child welfare services was the district court, the statutory procedure for review in the Court of Appeals cannot be considered adequate so as to prevent equitable relief in the District Court since the statutory review provisions did not cover the entire case made by petitioners' complaint. **Hillsborough Township v. Cromwell,** 326 U. S. 620, 629; **Greene v. United States,** 376 U. S. 149, 163. Consequently, the district court had the power and the authority under section 10 of the Administrative Procedure Act and section 603 of the Civil Rights Act to exercise its original jurisdiction over the entire case in order to afford adequate and complete relief to the petitioners. See **Hillsborough Township v. Cromwell,** supra, 326 U. S. at 629.

2. The decision of the Court of Appeals as to its jurisdiction does not take into proper account the fact that a main thrust of the petitioners' complaint in the district court was not to review the order of the Secretary terminating assistance under the pertinent programs but to secure a declaration that the regulations (45 C. F. R. 80) issued by the Secretary are "in excess of the authority and powers" of the Department of Health, Education & Welfare under "Title VI of the Civil Rights Act" (Record, Vol. II, pp. 9-11). Accordingly, the statutory provisions

for review of agency determinations under 42 U. S. C., § 1316 are inapplicable because the suit in the district court was "not one to 'review' . . . a decision of the [agency] made within its jurisdiction", but rather was "one to strike down an order of the [agency] made in excess of its delegated powers." **Leedom v. Kyne**, 358 U. S. 184, 188; **c. f. American Federation of Labor v. National Labor Relations Board**, 308 U. S. 401, 412. Furthermore, the issuance of the regulations by the Secretary does not constitute agency action for which judicial review is "otherwise . . . provided by law for similar action."[7] The review in the Court of Appeals provided by 42 U. S. C., Sec. 1316 relates only to a final determination by the Secretary that further payments will be terminated on the ground that the state plans no longer comply with the requirements for such plans under 42 U. S. C., § 304, 604, 1204, 1354, 1384, or 1396c. There is no provision for judicial review by the Court of Appeals of any regulation of the Secretary issued under the Social Security Act. Plainly, therefore, the statutory review provided by 42 U. S. C., § 1316 does not exclude the jurisdiction of the district court to adjudicate the validity of the Secretary's regulations on the ground that, as alleged by the petitioners' complaint, they exceed the authority and power delegated to the Secretary by the Civil Rights Act of 1964. **Leedom v. Kyne**, supra; **Abbott Laboratories v. Gardner**, supra.

3. Prior to the hearing in the District Court the complaint was amended to add as parties plaintiff four individuals who are recipients of federal funds administered under the programs as to which the Secretary's order terminated further payments (Record, Vol. II, pp. 70-72). Since the statutory provisions for review in the Court of Appeals under 42 U. S. C., § 1316 clearly apply only to

[7] Section 603, Civil Rights Act of 1964.

actions by a state and since section 603 of the Civil Rights Act of 1964 contemplates that there may be "persons aggrieved" other than a state or political subdivision for whom the remedies available under section 10 of the Administrative Procedure Act would be applicable, the district court would have jurisdiction over an action by those private individuals if they have standing and constitute "persons aggrieved" within the meaning of section 603. The Court of Appeals declined to consider and decide the effect of the joinder of the individuals as plaintiffs except to the extent of concluding that their joinder "does not defeat the sole and exclusive jurisdiction" of the Court of Appeals over "actions brought by a state" (Opinion, p. 18). The opinion below concluded that the issues relating to the standing of the private litigants and the propriety of their joinder with the State of Alabama "are issues which are not before us".

The petitioners submit that because the private individuals had been made parties at the time of the judgment in the district court and since the existence of a federal court's subject matter jurisdiction is always open to inquiry, the Court of Appeals should have determined whether the individual plaintiffs have standing and whether the District Court had jurisdiction over their actions against the Secretary. For if the individual plaintiffs have standing to challenge the actions of the Secretary and are "persons aggrieved" within the meaning of Section 603, their joinder with the State of Alabama as a plaintiff in the District Court would not affect their individual rights to an adjudication of the merits of the complaint in the district court regardless of the right of the State of Alabama to such an adjudication.

As direct beneficiaries of the funds administered under the programs of the Social Security Act as to which the Secretary terminated further payments, the individual

plaintiffs are the persons primarily affected by the action of the Secretary. In pertinent part, section 603 provides that upon termination of financial assistance, "any person aggrieved (including any state or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 10 of the Administrative Procedure Act. . . ." By its use of the word "including" it is clear that the provision for review is intended to encompass persons other than the state which administers the program. Other than the state, the only persons who could possibly be considered "persons aggrieved" by agency action terminating the continuance of financial assistance are those persons, such as the individual plaintiffs and petitioners in the present case, who are the recipients of funds administered under these programs. **Cf. Freeman v. Brown**, 342 F. 2d 205 (5th Cir. 1965); **FCC v. Sanders Bros. Radio Station**, 309 U. S. 470; Jaffe, "Standing to Secure Judicial Review: Private Actions," 75 Harv. L. Rev. 255 (1961). See Note, "Federal Judicial Review of State Welfare Practices", 67 Colum. L. Rev. 84, 117-29 (1967). Unless it be shown, and it has not, that it was specifically intended by Congress that private persons who are beneficiaries of the programs as to which provision is made in Title VI of the Civil Rights Act for termination of funds are not "persons aggrieved," those persons should clearly have standing to challenge the validity of actions of the Secretary in terminating further financial assistance under those programs. In failing to consider and decide the effect of the joinder of the private individuals as plaintiffs in the District Court and to pass upon their standing to challenge the validity of the Secretary's action in the present case, the Court of Appeals effectively deprives these persons of the remedy which Congress intended to confer upon them by Section 603 of the Act.

B.

In addition to the jurisdictional questions discussed in which we contend that the United States District Court, Northern District of Alabama, had jurisdiction and that the Court of Appeals erred in holding otherwise, we think the reasons relied on for allowance of the writ, as far as these questions are concerned, have been amplified in the foregoing sections of this petition, and we adopt with leave of this Court such amplification particularly set out under section or subsection (e) above.

All appendices required by these rules are attached, with the exception of the judgment or judgments of the United States Court of Appeals which we now append as Appendix E (the opinion of the Court of Appeals has been appended).

For the reasons advanced, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

In the United States District Court for the Northern District of Alabama, Southern Division.

The State of Alabama, for and in behalf of and as Trustee for the Department of Pensions and Security of the State of Alabama, Plaintiff,

vs.

John W. Gardner, as Secretary of the U. S. Department of Health, Education and Welfare of the United States, Defendant.

Civil Action. No. 67-19.

This case came on for hearing upon the defendant's motion to dismiss the action, and the motion in the alternative for a change of venue under §1406, Title 28, U. S. C. A., and upon the motion of the plaintiff, the State of Alabama, for and in behalf of and as Trustee for the Department of Pensions and Security of the State of Alabama, for a preliminary injunction, contained in the prayer of the bill.

The three motions were all set for hearing at 10:00 o'clock a. m., Wednesday, February 1, 1967, and at the commencement of the hearing the Court announced a submission upon the motion for a preliminary injunction would be required before making a decision on the motions of the defendant for reasons stated and appearing below.

The three motions were filed on Thursday, January 26, 1967, and, after being called to the attention of the Court,

a conference was held in chambers between the Court and counsel for both parties. I stated that because of my assignment to hold court in Tampa, Florida, for two and one-half weeks commencing Monday, February 6, 1967, and because of the absence of the Chief Judge, also on court assignment, and on account of commitments and assignments of the other Judge of this Court, which would consume all or a considerable part of the period of two weeks commencing Monday, February 6, 1967, it would be necessary that a hearing be held during the week commencing Monday, January 30, 1967, and that it would not be feasible to postpone the hearing on the preliminary injunction until a time after the expiration of the following two-week period in view of the urgency presented by the situation and the deadline date of February 28, 1967, for the cutoff of public welfare funds to the state under decision of the Secretary, making such cutoff effective as of that time, as will be more specifically mentioned in the Findings of Fact hereunder. Accordingly, the Court heard all three motions on Wednesday, February 1, 1967. At the beginning of the hearing plaintiff asked leave to file a second amendment to the complaint joining four individual parties as plaintiff, alleging that each was a recipient of public welfare funds in Alabama and eligible therefor, and that all four were residents of Jefferson County in the Northern District of Alabama. The amendment, by its terms, was a class suit for the benefit of all welfare recipients throughout the state, upon averment that they were so numerous that it was impracticable to name them in the suit, in effect. In this amendment the individual plaintiffs alleged that they adopted the allegations of the complaint theretofore filed. Upon inquiry, the Department of Justice attorneys, representing the Secretary, stated that they had received a copy of the amendment the night before and made known to the Court that defendant does not consent to

the filing that it was at least questionable whether the individuals had standing to sue. The Court allowed the filing of this amendment.

After hearing the evidence, including evidence upon the motion for preliminary injunction (contained in the prayer in the complaint), and argument of counsel and taking a submission upon the motions, the Court decided to take the motions of defendant under advisement and to grant a preliminary injunction for reasons hereinafter stated, and finds the facts as follows:

Findings of Fact.

On January 12, 1967, the defendant, the Secretary of Health, Education and Welfare, rendered a decision having the effect of terminating Federal financial assistance to the State Agency, the Alabama Board of Pensions and Security, which, along with the Alabama State Board of Pensions and Security, were respondents to a compliance proceeding pursuant to § 602 of the Civil Rights Act of 1964 and the regulations of the Department of Health, Education and Welfare issued pursuant thereto. The date of termination of all funds was fixed by said written decision of the Secretary as of midnight, **February 28, 1967.**

The next day, January 13, 1967, plaintiff filed its action in this Court seeking a judicial review of the Secretary's decision under § 1009, Title 5, U. S. C. A., The Administrative Procedure Act (Rewritten as Title 5, Chapter 7, Sections 701-706), and praying for an injunction, both permanent and preliminary, and also invoking this Court's general jurisdiction (which includes general equity jurisdiction) under § 1331 of Title 28. The decision of the Secretary is attacked on numerous and variously stated grounds and on January 16, 1967, prior to any perfected service upon the Secretary, filed an amendment to the

complaint specifically attacking the validity of Federal regulation 45 C. F. R. 80, and the Federal form alleged to have been required by the Department of Health, Education and Welfare for signing by the Alabama Department of Pensions and Security and the Alabama State Board of Pensions and Security (actually the governing board of the state department), under Title 49, Alabama Code of 1940, as amended (the department was formerly named the Alabama Department of Welfare, and the board the Alabama State Board of Welfare). The regulation and a portion of the form complained of are set forth on page 2 of the first amendment to the complaint, and relate to what may be characterized as the "third party" assurance, meaning in essence persons or organizations (even in private business) over whom such state department alleges that it has no control. We quote the part of the form set out, a form which, under the evidence, was issued by the department for the purpose of implementing the regulation.

> "2. **Discriminatory Practices Prohibited.** The State agency will not, directly or **through contractual or other arrangements**, on the ground of race, color, or national origin: a. deny any individual any aid, care, services, or other benefits provided under the program; b. provide any aid, care, services, or other benefits to an individual which is different, or is provided in a different manner, from that provided to others under the program; * * *
>
> 4. **Other Agencies, Institutions, Organizations, and Contractors.** The State agency will take such steps as necessary to assure that **any other** agency, institution or organization participating in the program, **through contractual or other arrangements**, will comply with the Act and Regulation" (Emphasis supplied).

The claim is made by and in behalf of the state department and the evidence supports this (the entire form is in evidence) that the Federal Department required the signing of the assurance contained in said form as a condition precedent to continuing to receive Federal financial assistance. The claim is further made that under the interpretation placed upon the required assurance that the state agency must take such steps as necessary to assure that third parties, through contractual or other arrangements, comply with the act and regulation, involving as it does private physicians, nursing homes, church homes (assuming the lodging, and other care in their institutions for dependent children), hospitals, etc., are unreasonable and in excess of the authority of the Civil Rights Act of 1964. Both the validity of the regulation and the assurance form are attacked, as well as the express interpretation of the Federal Department placed upon them.

One of the principal attacks is based upon the provision of the Civil Rights Act of 1964 to the effect that the Federal agency is authorized and directed to effectuate the provisions of § 601 with respect to any program or activity by issuing rules, regulations or orders of general applicability which are consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

Examples of the basis of the State's contention are shown in quotations in the first amendment to the complaint on pages 3, 4, 5 and 6. Quotations are from the testimony of the State Commissioner of the State Department given on a hearing in Washington in the latter part of October, 1965, the hearing being held under the procedures prescribed by the Federal Department and provided for and required in Title VI of the Civil Rights Act as one of the steps to be taken before the withholding or cutting off of funds.

The Court will not dwell at length upon all of the contentions made as the basis for the State's attack in view of the fact that no decision is made on the merits, the matter being only on preliminary and not permanent injunction. A brief reference will be made to the examples (shown in the testimony) on pages 3 and 4 of the first amendment. The testimony delineated (and shown by the evidence before this Court) along with the testimony of the Federal Department official on the hearing in Washington, shows that, according to the Federal Department's interpretation, private physicians used by the state department in examining patients in each of the 67 counties of Alabama, under the Welfare Program must provide desegregated waiting rooms and rest room facilities; and physicians who refuse to make such provision cannot be used if Federal funds are employed by the State as a part of the payment made to him. It is claimed that the State has no control over the private physician, that there are instances where the doctor or doctors available in a given county or counties refuse to agree to this condition even though in all cases white and Negro welfare recipients are examined or treated by the physician, and both are provided with separate waiting and rest rooms. It is claimed, for example, that such requirement is not consistent with the objectives of the Social Security Act authorizing such financial assistance, the objections being, according to the contention of the State, to administer medical service. This is not an attempt to state the whole case, for the reasons stated.

Alabama's welfare programs, under applicable Federal laws, are as follows:

Social Security Act	U. S. C. A.
Title I (Old Age Assistance and Medical Assistance to the Aged)	Title 42, §§ 301-305
Title IV (Aid to Dependent Children—Alabama Program)	Title 42, §§ 601-606
Title V, Part 3 (Child Welfare Service)	Title 42, §§ 721-728
Title X (Blind)	Title 42, §§ 1201-1206
Title XIV (Aid to the Total and Permanently Disabled)	Title 42, §§ 1351-1355

Facts Pertaining to the Jurisdictional Question.

The evidence shows without dispute, and the Court so finds, that on both State and County levels the public assistance and child welfare activities are so interrelated that it is impossible to carry out the aims of the department to needy families and children without full collaboration and coordination. Each program in its actual operation is closely related and dependent upon the others. This evidence is wholly in affidavit form, introduced in behalf of plaintiff.

Facts Pertaining to the Venue Question.

The evidence, also wholly in affidavit form, and not disputed, shows that the welfare program in each county in the State is administered by the County Department as an integral part of the State Department, as provided by Alabama law, Title 49 of the Code, with offices in each county. Of the total population of the State, 56.8% are residents in the northern district of Alabama. Based on the 1960 census, of the total number of cases in the state receiving welfare payments 149,063, 55.6% are in the area of the northern district of Alabama (one case often

includes more than one person as a beneficiary, and it is estimated that approximately 200,000 individuals throughout the State receive welfare benefits). Also, for the month of December, the total amount of payments for the State amounted to $9,671,947.55, of which 56% represented payments in the northern district of Alabama. The majority of the nursing homes, day-care centers, hospitals, etc., are in the northern district of Alabama. The four individual plaintiffs added by amendment are receiving welfare benefits and are residents of Jefferson County and reside in the northern district of Alabama.

Further Facts Pertaining to Preliminary Injunction Issue.

The prime issue between the parties is the validity of the regulation and the Federal requirements, and involves a question of law. However, whether purely a question of law or a mixed question of law and fact, the Court is not passing upon the question at issue at present and does not deem it necessary to comment further upon the evidence shown in the administrative proceedings. The Court is of the opinion that the questions involved in that respect are substantial. In regard to the factors of the balance of damage and convenience, and irreparability of injury, and the public interest, the evidence shows without dispute that the grant award to Alabama for all of the programs for the period commencing January 1, 1967 through February 28, 1967 (the cutoff date), amount to a total of $1,499,780.21. This is only for two months. For the fiscal year ending September 30, 1966, Federal funds actually expended by the State Department for welfare recipients amounted to approximately $95,000,000 and the State funds expended were approximately $31,000,000. The budget for the fiscal year ending September 30, 1966, was $103,000,000 of Federal Funds and $35,000,000 of State funds. This evidence, along with the allocation for each

program above mentioned, and further evidence by affidavit, shows without dispute that in each and every program irreparable injury and damage will be done if the cutoff of Federal funds becomes effective, and the matter involved is one of great urgency and vital importance to the people who depend upon welfare funds for their very existence, as well as employees of the state department whose salaries are paid in whole or in part from Federal funds, and the Court so finds. The Court so finds all the facts found (regardless of the heading under which they are classified herein) are considered in connection with all the issues between the parties.

Conclusion of Law.

A preliminary injunction should be granted where, upon consideration of the factors or probability of entitlement to relief, balance of damage and convenience, irreparable injury and damage if the injunction is not granted, and the public interest involved, it is determined that the granting of the injunction will best serve the interests of justice.

Order on Defendant's Motion.

It is ordered by the Court that the motion filed by the defendant to dismiss for ground of lack of jurisdiction, and the defendant's motion in the alternative for change of venue, such motions raising serious and intricate problems as to jurisdiction and venue which the Court cannot now resolve, are taken under advisement.

Temporary and Preliminary Injunction.

Pursuant to the findings of the Court, and pending final hearing and final decree, herein, and until modified by further court order; it is

Ordered, Adjudged and Decreed by the Court that the Defendant, John W. Gardner, Secretary of the U. S. De-

partment of Health, Education and Welfare, his officers, agents, servants, employees and attorneys, and those persons in active concert or participation with him, who receive actual notice of this order by personal service or otherwise, be, and each of them are hereby, enjoined from:

(1) Withholding, discontinuing or cutting off in any wise financial assistance to the State of Alabama and to the Department of Pensions and Security of the State of Alabama under any and all welfare programs administered by said State and State Department (including the State Board of Pensions and Security) under Titles I, IV, V (Part 3), X and XIV of the Social Security Act, pursuant to the Secretary's order of January 12, 1967.

(2) Carrying into effect the order, directive or decision of the defendant, the Secretary of the U. S. Department of Health, Education and Welfare, made January 12, 1967, approving or directing the withholding, discontinuance or cutting off of Federal funds to each and all of the welfare programs of the State of Alabama and said State Department (including the State Board of Pensions and Security) described in Section 1 just above.

It is further Ordered, Adjudged and Decreed that no bond or security is required to be given as a condition of said injunction.

Done and Ordered this 3rd day of February, 1967.

C. W. Allgood,
United States District Judge.

APPENDIX B.

In the Matter of the Alabama State Board of Pensions and Security and the Alabama State Department of Pensions and Security. } Docket No. CR-1.

COMPLIANCE PROCEEDING PURSUANT TO SECTION 602 OF THE CIVIL RIGHTS ACT OF 1964 AND THE REGULATION OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE ISSUED PURSUANT THERETO.

Action of the Secretary of Health, Education and Welfare.

This case involves the refusal of the Alabama Board of Pensions and Security and the Alabama State Department of Pensions and Security (hereinafter referred to jointly as the Agency) to comply with the Regulation issued by this Department and approved by the President pursuant to Section 602 of the Civil Rights Act of 1964 (45 CFR 80).

Under Section 80.4 (b) of this Regulation each State agency administering "continuing" public assistance and welfare programs financed in part by Federal funds is to submit a statement of the extent to which those programs are and are not in compliance with Title VI of the Civil Rights Act and a description of methods of administering those programs which the Commissioner of Welfare finds give reasonable assurance of securing compliance under Title VI. The Alabama agency administers such programs under Titles I, IV, V (Part 3), X and XIV of the Social Security Act. Their programs provide for Old Age Assistance and Medical Assistance for the Aged, Aid to Families with Dependent Children, Child Welfare

Services, Aid to the Blind and Aid to the Permanently and Totally Disabled.

Only the Alabama agency, among the welfare agencies of all the States, has refused to submit the required statement and description of its compliance program. Between December 1964 and August 1965, the Commissioner of Welfare, through printed materials, briefings, private conferences and direct correspondence, sought the compliance of the Alabama agency.

On August 17, 1965, however, the Commissioner determined in writing that she was unable to bring the Agency into voluntary compliance with Title VI and scheduled a hearing on the matter. A notice was sent to the Alabama agency on that same day by the General Counsel of this Department specifying those matters of fact and law which were considered to constitute non-compliance and stating that Federal assistance to Alabama under the programs involved would be terminated if the Agency was found to be in non-compliance.

The hearing procedures called for in Section 602 of the Civil Rights Act and in Sections 80.8 (c), 80.9, 80.10 and 81 of the Regulation of this Department (45 CFR, Parts 80 and 81) have been followed.

The Hearing Examiner in this case recommended on April 6, 1966, that the Alabama welfare agency be found in non-compliance with Title VI and that Federal assistance to Alabama under Titles I, IV, V (Part 3), X and XIV of the Social Security Act be terminated. After a hearing and the consideration of briefs and exceptions, the Commissioner of Welfare substantially adopted those recommendations in a decision dated November 16, 1966.

My function is to "approve such decision, . . . vacate it, or remit or mitigate any sanctions imposed" . . . (45 CFR, Part 80, Section 80.10 (e)). If I approve any termination of Federal assistance as a result of a finding

of non-compliance with Title VI, I am to make a full report of the matter to the Ways and Means Committee of the House of Representatives and to the Senate Finance Committee. Under the law the effective date of such termination is to be no less than thirty days after such reports are filed.

I have reviewed the Commissioner's decision, the testimony, exhibits, briefs and recommendations on which it was based, the exceptions filed by the Alabama agency and the reply thereto of the General Counsel of this Department.

Three requests or motions made by the Alabama agency call for an answer at this point:

1. **Request for a hearing before the Secretary.**

   Under Section 81.106 of this Department's Regulation or independent thereof, the Agency requests an opportunity to make an oral presentation to me.

   This request is denied. In my opinion the issues in this case have been fully elaborated, clarified and emphasized in the testimony before the Hearing Examiner and the Commissioner and in the exhibits, briefs, recommendations and decision which have been submitted.

2. **Motion to present current data concerning civil rights in Alabama as it relates to grants and services under the child welfare and public assistance programs involved in this proceeding.**

   The Alabama agency asserts that changes have taken place since the time of the hearing before the Examiner which "materially affect" Alabama's right to receive Federal assistance for child welfare and public assistance programs. They ask to be allowed to submit such evidence by affidavit or otherwise or that final decision be withheld until this evidence can be presented at a new hearing.

This motion is denied. Evidence of decreased racial discrimination in the operation of the Federally assisted child welfare and public assistance programs in Alabama would be welcome. However, such evidence of decreased discrimination alone would not compensate for the failure of the Alabama agency to commit itself to achieve non-discriminatory care and services in Federally-assisted programs as called for in Section 80.4(b) of this Department's Regulation. Were it willing to do so, however, this evidence would, of course, be relevant and needed to evaluate the adequacy of the methods of administration which it would propose to use to assure compliance with Title VI.

3. **Motion to incorporate Title XIX into this proceeding.**

Pursuant to Section 81.56 of this Department's Regulation, the Alabama agency moves to add to this proceeding, the question of the compliance of its proposed Medical Assistance program with Title VI. The Agency is trying in this way to have this new program approved and funded without providing the assurances of non-discrimination called for in our Regulation. The Agency promises only to comply with what the courts ultimately decide it must do.

This motion is denied. I do not believe that granting it would be either timely or appropriate.

This Department shares the expressed interest of the Alabama welfare agency in bringing the benefits of Title XIX to the people of Alabama as soon as possible.

We stand ready to help it to resolve all of the issues—civil rights and otherwise—which presently stand in the way of approval of its Title XIX plan.

If the Commissioner of Welfare determines that voluntary compliance with Title VI requirements cannot be obtained for that plan, formal action on the matters in dispute will be expedited.

Approval of Decision.

The Alabama agency recognizes that the "legality" of this Department's Title VI Regulation is not a question to be considered in this proceeding. This issue may be raised before the courts.

Within the area of Departmental discretion under the Regulation, however, I consider the actions of the Commissioner of Welfare in this matter to have been reasonable and appropriate and I approve her decision that the Alabama agency is not in compliance with Title VI.

It is disappointing that we have had to seek compliance formally in an area where the voluntary cooperation of all parties is so important. It is particularly unfortunate that such action may necessitate the termination of badly needed Federal welfare funds in Alabama.

The Alabama welfare agency in effect seeks to force this Department to choose between its mission to assist States in aiding the needy and its obligation to secure non-discriminatory treatment for those receiving assistance through Federally aided programs. As stated at page 26 of its brief to the Commissioner of Welfare, "Until public assistance recipients receive an adequate grant and receive needed services, Respondents submit that the requirements of the Civil Rights regulations are irrelevant, oppressive and illegal."

This Department does not agree that the poor and the disabled are less entitled to non-discriminatory treatment than other Americans. We do not propose to ignore or postpone their fundamental human rights until we can adequately provide for their physical needs. We do not accept the proposition that seeking non-discriminatory care for the needy will reduce the amount of care available to them.

It seems self-evident that the more scarce facilities are, the more important it is to try to assure full access to them by all those in need of assistance under Federally aided programs.

The Alabama agency alone among the welfare agencies of all the States has refused to accept the procedures suggested by the Welfare Administration for compliance with Title VI. It has attacked the validity of the provisions in Section 80.3 of the Department regulation which prohibits discrimination in the provision of Federally-assisted services through third parties. It has been unwilling to commit itself to achieve non-discriminatory care and services in Federally-assisted programs as called for in Section 80.4(b) of that regulation. It has not adopted or proposed methods of administering its programs which give "reasonable assurance" that compliance with Title VI can be obtained; nor has it made a clear commitment not to discriminate on the basis of race in those aspects of its program which are solely within its control as is also required in Section 80.4(b). It has said only that it will comply with the Civil Rights Act as that Act is interpreted in the courts.

To await ultimate judicial review and approval of the Department's Regulation before enforcing its provisions would constitute an abdication of the responsibility of this Department.

The object of Title VI and of our Regulation is to assure that with respect to Federally-assisted programs no person shall on the basis of race, color or national origin be subjected to discrimination or excluded from any Federal benefit.

Where compliance with this statutory mandate cannot be secured by voluntary means, Congress has directed that, after an opportunity for a hearing and a finding on the record, Federal agencies and departments are to ter-

minate or withdraw financial assistance. The procedures prescribed by Congress have been adhered to fully and meticulously. Alabama continues to have the right of seeking judicial review of any final action taken by the Department.

The refusal to submit the required assurances and methods of administration is more than a matter of form. The General Counsel is correct in stating that in programs such as these:

> "The Federal-State relationship is grounded in State plans which evidence the State's commitment, whereby the single State agency (here, the Respondents) is charged with responsibility for seeing that Federal requirements are met. In absence of such an undertaking of responsibility by the State, there is no basis for operation of the Federal-State program."

As he also stated:

> "With the enactment of Title VI the State's responsibility was automatically extended, if it desired to continue to receive Federal financial assistance, to embrace the prevention of racial discrimination under the programs."

Alabama has refused to comply with the Department Regulation despite the repeated conciliatory efforts of the Commissioner of Welfare to find a basis for agreement. Correspondence from the Commissioner and the General Counsel and their statements in this proceeding make clear that they have remained ready to consider any reasonable modification proposed by the State to the suggested procedures which would still meet the requirements of the Regulation.

Specifically, the Alabama welfare agency has been assured in writing that it need commit itself to compliance only for those programs under which it wishes to qualify

for continued Federal assistance. The Agency also has been advised that it may negate any inference that it is guaranteeing the compliance of those whom it compensates for furnishing services to beneficiaries of Federal Services.

It should also have been obvious to the Agency that it could have offered to comply on those parts of its programs which do not involve any compensation for services provided to beneficiaries by third parties. More than 80 percent of the Federal assistance provided for its programs does not involve such third party services.

None of these possibilities has produced any perceptible movement by the Alabama agency toward compliance for any part of its programs. It remains in non-compliance in at least the following respects:

1. It has not made a clear and adequate commitment to insure non-discriminatory operation of its Federally aided welfare programs even in those parts which involve payments or the provision of services directly to beneficiaries by the Agency. As stated by the General Counsel at page 4 of his brief dated December 22, 1965, "This prohibition against discrimination extends to any differential treatment on account of race in any aspect of the making of money payments, including the treatment of individuals in facilities where application is made, any medical examinations incident to the determination of eligibility, the determination of eligibility itself and the amount or type of benefits or social services, and the assignment of case workers." The prohibition against discrimination similarly extends to other matters which are under the Agency's control such as the location of local offices.

2. The Alabama agency has refused to accept any responsibility for assuring that third parties to whom

it provides services, or whom it compensates in connection with care they provide to beneficiaries, shall provide such care without racial discrimination.

3. It has not provided an adequate statement of the extent to which racial discrimination presently exists in connection with its Federally-assisted welfare programs.

4. It has not agreed to or proposed methods of administering its Federally-assisted welfare programs—even in connection with those matters which do not involve the services of third parties—in a way that gives reasonable assurance that those parts of its programs will be operated on a non-discriminatory basis. More specifically, it has **not**:

(a) provided sufficiently for instruction or dissemination of information about the rights and responsibilities under Title VI of staff members, beneficiaries or third parties providing services;

(b) proposed any system of surveying compliance, keeping records or filing reports that would enable compliance to be properly evaluated;

(c) suggested a complaint process that offers all interested or affected persons an adequate opportunity for consideration of complaints of alleged non-compliance.

In short, more than two years after promulgation of this Department's Title VI Regulation and more than 16 months after receipt of the bill of particulars contained in the General Counsel's letter of August 27, 1965, the Alabama agency has not offered to correct any of the deficiencies in compliance as to any part of any of its Federally-assisted programs.

Exceptions Taken by the Alabama Agency.

The Alabama agency has taken numerous exceptions to the decision of the Commissioner of Welfare most of which repeat exceptions which it had taken to the Hearing Examiner's recommended decision.

I have considered each of these and make the following rulings on them:

I. **Withholding of Funds for Direct Grants to Public Assistance Recipients.** The Alabama Welfare agency contends that the parts of its programs which involve direct money payments to beneficiaries are separable from the parts which involve payments to third parties for services to beneficiaries, that no significant discrimination has been shown as to such direct payments and therefore that Federal funds for such payments should not be withheld.

Commissioner Winston's decision did not rule that the Alabama agency could not comply on the direct payment parts of its programs alone. She noted, however, that it was still not clear "whether the Respondents are prepared to offer a Statement of Compliance which the Commissioner of Welfare could find acceptable under Federal law and regulations with respect to direct money payments."

The Alabama agency seems unwilling to accept the fact that it must do more than pledge non-denial of benefits based on race and refute any allegations of discrimination which are made.

Section 601 of the Civil Rights Act of 1964 provides not only that beneficiaries of Federally assisted programs shall not be denied benefits on the basis of race, but also that they shall not be subjected to racial discrimination under such programs.

In accordance with Section 602, the Regulation which this Department has issued seeks to effectuate

those provisions consistent with the achievement of the objectives of the various programs covered by this Regulation.

The Regulation seeks to do so in the tradition of Federal-State health, welfare and education programs by providing for each State agency to submit a statement assuming responsibility for securing compliance with Title VI and a program for achieving that result. As stated earlier, the Alabama agency has refused to submit such a statement and a program.

The Agency also suggests that its practice of assigning case workers to beneficiaries on the basis of race is excluded from the coverage of Title VI by Section 604. I reject that suggestion. Section 604 does not excuse discriminatory employment practices which also constitute discrimination in the way services are provided to beneficiaries of Federally assisted programs. This has been our consistent position in connection with the assignment of teachers under Federally assisted education programs and it is equally applicable to case workers employed by State Welfare agencies.

The exception of the Alabama agency to the withholding of Federal funds for direct payments to beneficiaries is therefore denied because the Alabama agency has thus far refused to comply with the requirements of Title VI even as to such direct payments.

As noted by the General Counsel at pages 7 and 8 of his brief:

> "In the Federal-State programs, the Congress has made Federal financial assistance available to the States if they comply with certain Federal requirements prescribed in or pursuant to the applicable Federal statutes. The States have the

sole choice as to whether they wish to participate in any program. If the Respondents will not comply with the requirements pursuant to Title VI of the Civil Rights Act of 1964, it is their choice, and theirs alone, not to be eligible for Federal financial assistance."

"Respondents have challenged the implementation of Title VI in the simplest and most fundamental way—by refusing to agree to a basic condition for operation of the programs. Unless the Federal authorities are to abandon their responsibility for carrying out the Federal statute and the Presidentially-approved Regulation, there is no alternative to acceding to the State's choice to opt out of the Federal-State programs."

The Alabama agency is specifically invited, however, to submit a satisfactory compliance statement and methods of administration to cover at least the parts of its programs which provide for direct money payments. Such action on its part would make it possible for us to continue more than 80 per cent of the Federal assistance we are now providing for the programs in question. The Commissioner of Welfare is available to discuss this possibility if the Alabama agency so desires.

II. Withholding of Federal Funds Used to Pay for Services Where the Beneficiary Has Selected the One Providing the Service. The Alabama agency urges that Federal funds used to pay for the services provided by third parties should not be terminated because of racial discrimination in providing such services since the beneficiary not the State agency selects the one to provide the service.

This exception is also rejected. The refusal of the Alabama agency to accept responsibility for assuring

beneficiaries are served without discrimination cannot be justified on the ground that the beneficiaries are "free" to choose the providers of their care. In many cases the beneficiaries have no choice but to accept what they can get on whatever terms it is offered and wherever in the State it is available. The ultimate object of Title VI, this Department's Regulation and this proceeding is to broaden their choice and to improve their options.

It is also noted that the Alabama agency performs functions in connection with third party "vendors" beyond paying for their services. Either directly or through other State agencies it negotiates or sets the fees which it will pay and it is involved—as the Agency itself admits—in at least "helping" make arrangements for medical care "if requested to do so."

If the Alabama agency would assume its responsibilities, the termination of Federal funds for third party payments could be avoided. We could work together with the Agency toward our common objective of better service for the needy of Alabama.

III. **Withholding of Administrative Funds.**

The Alabama agency states that "Commissioner King has made it clear that he will do everything within his control to comply with Title VI of the Civil Rights Act, and it excepts to any withholding of Federal funds for administration of Alabama's Public Assistance and Child Welfare programs."

The exception is denied. For the reasons set forth above, I do not believe that either Commissioner King or those representing him in this proceeding have made clear that the Alabama agency is complying or is ready to comply with Title VI on any of its programs or parts thereof.

If the Agency is ready to do so now, however, for those parts of its programs which involve only direct payments and services to individuals, we will be able to continue providing funds for administration of those program parts.

IV. **Exceptions Repeated From Brief to the Commissioner of Welfare.**

(1) **Determination of the Alabama Agency's Unwillingness to Comply Voluntarily.** The Agency contends that both the Hearing Examiner and the Commissioner of Welfare misjudged it. It asserts that it "wishes now to comply with any legally effective law or rule and regulation," but that the Agency does not consider the Title VI regulation of this Department to be legally effective in Alabama. It seems to suggest that since it may seek judicial review of our Regulation and since it has said it will comply with what the courts will enforce, that it is premature to find it unwilling to comply.

I agree with Commissioner Winston's overruling of this exception. The "willingness to comply" which the Alabama agency expresses is neither adequate nor immediate.

(2) **Proposed Findings.** The Commissioner of Welfare recognized that the Alabama agency had proposed findings to the Hearing Examiner and the Agency stated that she had corrected the error alleged.

(3) **Application of Title VI to Discrimination in Services Provided by Third Parties in Federally Assisted Programs.** The Alabama agency repeats its objection to the Hearing Examiner having summarized part of its position as being "that Title VI of the Civil Rights Act does not, in substance, authorize the Federal Government to object where individuals are separated or segregated on the grounds of race, color

or national origin, in being provided benefits under Federally financed assisted programs, particularly when such services are provided by third parties through contractual or other means." The Agency says instead that its position is that it does not have the power to compel such third parties to stop discriminating on the basis of race.

The Commissioner of Welfare overruled the exception saying that she considered the Hearing Examiner's interpretation "to be more in accord with the Respondent's primary position than the exception suggests."

I agree. However it is phrased, the Alabama agency is saying that in complying with Title VI it should not have any responsibility to avoid arrangements with third parties who discriminate.

No one has suggested that it can compel private parties to provide services to Federally assisted beneficiaries without discrimination.

Our Regulation under Title VI is based upon the premise that most of those providing such services can be persuaded to provide them non-discriminatorily and to the extent they will not, that Federal funds should not be paid to help perpetuate such discriminatory practices against innocent beneficiaries. Alternate, acceptable services should be found and developed.

The Alabama agency has refused to be a party to such persuasion and administrative action, at least until it has exhausted its rights to judicial review. Assuming the legality of our Regulation were upheld, the Agency apparently would then accept responsibility for seeking third party compliance—although, of course, it will have no greater power then to compel such compliance than it now has.

(4) **Eligibility for Public Assistance in Alabama.** The Alabama agency repeats its exception to the Hearing Examiner's statement that "a completely destitute aged individual may receive a money payment of $75 per month." The Agency concedes that this is or was correct but contends that it is misleading because "a person need not be 'completely destitute' to receive the amount."

I concur in the Commissioner's ruling that the issue involved here is immaterial.

(5) **Help Provided in Arranging for Medical Care.** The Alabama agency asserts that the Hearing Examiner erred in stating that "quite frequently" it participates in helping to make arrangements for those needing medical care and that the Commissioner of Welfare failed to recognize that this was "an incorrect reference to freedom of choice" which raises "a material question."

The Commissioner noted that the Alabama agency's view of its undertakings on behalf of those wanting arrangements for medical care to be made for them was more limited than that of the Examiner. She found support for this statement in the record, however, and determined that "in any event, the Exception relates to an issue substantially immaterial to the basic mode of administration to which it is addressed."

This exception is again overruled. As stated earlier, the Alabama agency, as the disburser of Federal funds for welfare in Alabama, has a responsibility to seek an end to discrimination in the services provided by third parties under Federally assisted programs.

This is true even when the individual selects the provider of his care. The extent of the Alabama agency's involvement in making arrangements for

such care does not affect the existence of that responsibility but only the ways in which it should be exercised.

(6) **Securing the Services of Physicians.** The Alabama agency also repeats its exception to the Hearing Examiner's statement that the Alabama agency uses the services of physicians to determine eligibility for certain forms of public assistance. It again urges the materiality of any point relating to freedom of choice.

In its previous assertion of this exception the Agency had also noted a second reference to the eligibility of "completely destitute" persons which it considered misleading.

For the reasons stated in dealing with exceptions (4) and (5), I consider that this exception is not material and concur in the Commissioner's action on it.

(7) **Omission of Findings on the Legislative History of the Civil Rights Act of 1964.** The Commissioner properly overruled this exception. As noted earlier the "legality" of this Department's Title VI Regulation will not be considered in this proceeding. Therefore, no findings of legislative history are considered necessary to support it.

(8) **Discrimination in Availability of Day Care Centers.** The Alabama agency repeated its objection to the Hearing Examiner's statements concerning discrimination in the availability of day care centers in Alabama. It objects to his having stated that the same ratio of availability of better quality day care centers existed in favor of whites as was true for day care centers in general.

The Commissioner of Welfare did not consider this objection material because it was directed at the precise ratio of white to Negro quality day care centers

and did not dispute the findings of discrimination in the availability of those centers. Her ruling is affirmed.

The analysis "of the ways in which discrimination exists or is practiced" which the Alabama agency urges be undertaken, can best be done—as our Regulation provides—by the Alabama agency as part of its program of compliance with Title VI.

(9) **Separate But Equal Doctrine.** The Alabama agency contends that it is not seeking to justify the segregationist practices of third parties providing services under Federally assisted programs but is only contending that it is unable to require civil rights compliance by such parties. It "objects strenuously" to the Hearing Examiner's statement identifying its position with the separate-but-equal doctrine.

This objection is overruled. The Hearing Examiner's characterization was neither unreasonable nor material.

Without using the phrase "separate but equal", the Alabama agency has repeatedly urged that compliance with Title VI should not be considered to require it to seek "sociological purity of the supplier of services to the indigent." It has sought to establish its compliance with Title VI principally on the basis that no beneficiary is denied benefits in Alabama because of race even though such benefits may be provided on a segregated or discriminatory basis.

All of these things indicate the acceptance by the Alabama agency of present patterns of segregation and discrimination in providing federally assisted welfare services.

Whether or not the agency approves of such segregation and discrimination or merely acquiesces in it, its approach would help to perpetuate such practices and does not discharge its responsibilities under Title VI of protecting beneficiaries from such practices.

(10) **Adequacy of Statement of Compliance.** The Alabama agency contends that it has filed a statement of compliance with Title VI. It also objects to the Hearing Examiner's determination that it had, in executing its State plan, in fact assumed responsibilities for assuring that third parties providing services must avoid discrimination in so doing.

The inadequacies of the statement submitted by Commissioner King were fully covered in the General Counsel's letter of August 27, 1965, and have been reaffirmed at each stage of this proceeding, including earlier parts of this action.

As Commissioner Winston noted, the point raised as to the State plan is immaterial.

(11) **Coverage of Individual Physicians.** The Alabama agency implies that since conditions in the offices of individual physicians are not explicitly covered in Title VI or in this Department's Regulation, we should not insist that those whose care is paid for with Federal funds are entitled to non-discriminatory treatment in such offices.

Commissioner Winston was correct in ruling that this matter is adequately covered in the illustrative examples of the scope of the Regulation, specifically in Section 80.5 (a).

(12) **Reasonableness of Compliance Requirements Regarding Third Party Actions.** The Alabama agency asserts again that it should not be required to "boycott" third parties providing services in a discriminatory manner under Federally assisted programs in order to receive such Federal assistance. It asks reexamination of its exceptions to the Hearing Examiner's decision in which the Agency observed that "It appears that the regulations with respect to third parties promulgated by the Department of Health,

Education, and Welfare are irrelevant, oppressive and illegal in Alabama."

As stated earlier the legality of the Regulation will not be considered in this proceeding and the expressed intention of the Alabama agency to seek judicial review of this Regulation will not be accepted in lieu of compliance with the Regulation.

(13) Failure to File a Statement of Compliance.

The Alabama agency excepts to a second finding of the Hearing Examiner that it did not submit a Statement of Compliance. It also refers to its exception to any withholding of Federal funds for direct money payments.

For the reasons stated in overruling exceptions I and 10, this exception is also overruled.

(14) Knowledge of Discriminatory Practices.

The Alabama agency contends that the Hearing Examiner incorrectly described Commissioner King's knowledge of discriminatory practices involving welfare recipients. The Examiner stated that "Respondents have neither made nor taken any action to make or secure a fair inventory or evaluation of the extent of unavailability of treatment, or other discriminatory practices directed against beneficiaries of the programs involved here, solely on account of their race or color, and Respondents have not evidenced any intention of so doing . . ."

As the Agency's brief to the Commissioner of Welfare indicates, the exception is based on the fact that Commissioner King did assert that he was informed about the availability of certain kinds of medical care to the needy of both races in Alabama. However, the Commissioner also testified that he had not tried to make any evaluation of Title VI com-

pliance or non-compliance in Alabama welfare programs and that the Alabama agency had no intention of signing a compliance statement covering contractual arrangements with third parties.

I agree with Commissioner Winston that the record supports the finding of the Hearing Examiner. Commissioner King did not have nor has he expressed any willingness to compile the detailed inventory of compliance and non-compliance required under Title VI. The finding should be modified, however, to reflect Commissioner King's knowledge about the availability or unavailability of certain forms of treatment.

(15) Segregation in County Office Buildings.

Commissioner Winston conceded that the Hearing Examiner's finding of segregation or discrimination in the use of physical facilities in county office buildings where welfare programs are administered, should be modified to indicate that such segregation or discrimination only exists in some of such buildings.

The Alabama agency still objects to the finding, stating that the testimony established "that county offices, with very few exceptions, maintain all facilities on a nearly non-discriminatory basis."

The Commissioner of Welfare ruled properly on this matter, in my opinion. The record does not make clear how extensive segregation is in such office buildings. The word "some" certainly does not prejudice the position of the Alabama agency that "with very few exceptions" such buildings are operated on a non-discriminatory basis.

(16) Validity of Department of Regulation.

The reservation of this exception is noted. As stated earlier, this matter will not be considered in this proceeding.

(17) **Failure to Find Non-Denial of Benefits on the Basis of Race.**

The Alabama agency "objects strenuously" to the lack of a finding that it does not deny benefits on the basis of race.

It is true that the Agency has repeatedly asserted that it does not deny benefits on the basis of race and that it is not aware of anyone who, because of race, has not been able to secure medical care or services somewhere in Alabama. Given the testimony as to the amount of discrimination and segregation existing and in the absence of a complete evaluation of the extent of compliance under Title VI, the Commissioner of Welfare correctly determined that it was neither possible nor appropriate to make the finding requested by the Agency.

(18) **Concern about Timing.** The Alabama agency does not press its exception that the Certificate of Service attached to the Hearing Examiner's Recommended Decision is defective because of incomplete dating. It suggests, however, "that on questions of timing the Department of Health, Education and Welfare has consistently shown a lack of concern about establishing the point of time in which certain legal actions can be deemed to have occurred or not to have occurred." As Commissioner Winston ruled and the Alabama agency seems to concede, any clerical error that occurred in connection with the Certificate of Service did not prejudice it. Its request for a hearing before the Commissioner was granted and its request for an extension of time to file their exceptions and briefs with me was granted,

The Alabama agency's "suggestion" of our lack of concern with the time at which legal actions "can be deemed to have occurred or not to have occurred" seems intended to renew its exception that this pro-

ceeding is premature. That exception is again rejected. Two years after the effective date of our Title VI Regulation is not too early to determine that agencies which have refused from the beginning to provide the assurances required, are not in compliance with Title VI.

(19) **Failure to Find that the Compliance Statement Required is an Unreasonable Implementation of the Civil Rights Act.** The Alabama agency objects to the failure to find that it should not be required to state more than that it will comply with the Civil Rights Act and that the compliance statement required by the Commissioner of Welfare is not authorized by the Civil Rights Act as it applies to welfare programs. This objection is overruled. The desired findings are wrong. Under the Title VI Regulation of this Department, the Alabama agency is required to state more than that it will comply with the law as it is ultimately interpreted in the courts. The compliance form which the Welfare Administration has suggested is a reasonable and appropriate implementation of that Regulation. It has also been made clear that it may suggest any modifications thereof which meet the requirements of the Regulation.

As requested by the Alabama agency, the material contained at pages 1-13 and 23-27 of the brief to Commissioner Winston is considered to have been included in the exception and brief which the Agency filed with me.

The points contained in those pages and in the conclusion to the brief filed with me are considered to have been adequately discussed and disposed of elsewhere in this action. Any point or exception raised by the Alabama agency and not otherwise disposed of is rejected.

Conclusion.

For the reasons stated above, I approve the decision of the Commissioner of Welfare that the non-compliance of the Alabama welfare agency with Title VI requires the termination of Federal assistance until compliance can be achieved.

Such a termination will produce serious hardship to many needy persons and their families in Alabama. It will also rupture a Federal-State relationship which has functioned for more than 30 years in serving the poor and disabled of Alabama.

I want to avoid both results to the extent possible. I cannot do so, however, by condoning the refusal of the Alabama welfare agency to assume the same kind or responsibility for Federal standards on non-discrimination that it has assumed for other aspects of its Federally assisted programs.

Although the Alabama agency has repeatedly stated its intention not to comply unless it fails to have the Commissioner's decision reversed on judicial review, I continue to hope that the Alabama agency will come into full compliance for all of its programs voluntarily and thus end the necessity of eliminating or reducing Federal assistance to the needy of Alabama.

Because its primary objection seems to be against requiring third parties to serve beneficiaries of Federal assistance without discrimination and because of its concern about termination of funds for direct money payments to beneficiaries, I have specifically invited the Alabama agency to submit adequate compliance statements for the parts of its plans which involve only direct money payments or social services to individuals. This option of compliance for some but not all of the Federally-aided programs has always been available to the State agency. I wish to urge the agency to avail itself of this option

during the period prior to the effective date of this order. If the agency fails to do so, it must assume full responsibility for any disruption in the provision of aid and care to the needy of Alabama.

As part of such compliance statements, the Alabama agency should state that third parties are not and will not be involved in the assistance and services provided to beneficiaries and therefore that the requirement of the Regulation concerning third party responsibility is not applicable.

Compliance with Title VI for those parts of the Alabama Public Assistance and Welfare programs which do not involve third party "vendors" would enable us to continue providing more than 80 percent of the approximately 95 million dollars that the Federal government contributes annually to those programs.

We regret that even if compliance is achieved for these program parts, Federal funds for medical assistance for the aged and the disabled will still have to be terminated in Alabama if the State Agency persists in its refusal to accept responsibility for securing compliance with Title VI by third parties providing such Federally assisted care. The necessity of terminating Federal funds used in making payments to physicians, hospitals and nursing homes in Alabama or in providing services to nursing homes and other institutions will also adversely affect the State programs for child welfare, aid to dependent children and aid to the blind.

I, of course, continue to invite the voluntary compliance of the Alabama agency for these third-party payments and services also.

I am this day filing a full report of this matter with the Ways and Means Committee of the House of Representatives and with the Senate' Finance Committee. Pursuant to Section 602 of the Civil Rights Act of 1964 and

Section 80.8 (c) of the Regulation of this Department, the decision terminating Federal assistance which is approved in this action will become effective at midnight, February 28.

As indicated above, I would welcome the opportunity to modify this action and the termination of funds to the extent that the Alabama agency comes into compliance as to all or part of any of the Federally-assisted programs involved. The opportunity for it to do so has been available for two years but I want to make it clear that the action I am now taking in no way reduces that opportunity or our desire that Alabama take advantage of it.

John W. Gardner,
Secretary,
Department of Health, Education and Welfare,
Washington, D. C. 20201.

Jan. 12, 1967.

APPENDIX C.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 24468.

John W. Gardner, Secretary of the United States Department of Health, Education & Welfare,
Appellant,

versus

The State of Alabama, for and in behalf of and as Trustee for the Department of Pensions and Security of the State of Alabama,
Appellee.

No. 24561.

The State of Alabama, for and in behalf of and as Trustee for the Department of Pensions and Security of the State of Alabama,
Petitioner

versus

John W. Gardner, Secretary of Health, Education and Welfare,
Respondent.

Appeal From the United States District Court for the Northern District of Alabama and on Petition for Review.

(August 29, 1967.)

Before Gewin and Ainsworth, Circuit Judges, and West, District Judge.

Gewin, Circuit Judge: The State of Alabama brought suit in the United States District Court for the Northern District of Alabama challenging the validity of an order issued by the Secretary of Health, Education and Welfare to terminate payment of approximately $100,000,000 in federal funds to the Alabama Department of Pensions and Security. The district court entered a preliminary injunction restraining the Secretary from enforcing the above order and the Secretary filed this appeal. The District Court expressly refrained from passing on the merits of the case. Alabama then petitioned this court for direct review of the Secretary's order, and its motion to consolidate the petition for review and the appeal was granted.

At the outset it seems appropriate to take note of the importance of this case. It is important because the real parties in interest are not parties to the controversy which gave rise to this litigation. The real parties in interest are the blind, the maimed and crippled, helpless old people, and innocent babies and children who are too immature even to realize that their fate is involved in these proceedings. We do not pause to fix the blame. Where the fault lies is not significant in view of the chief issues we must decide. There are many citizens in Alabama whose very existence and life's blood are dependent upon a proper resolution of the issues tendered to this Court. Undue delay, bickering and needless disputing will surely result in hunger, neglect and bitter hardship for those who are most interested. With these thoughts in mind, after giving the parties ample time to present their briefs[1] and arguments we proceed with restrained haste and appropriate deliberation to render our decision.

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[1] The final brief was filed on June 27, 1967.

Our conclusions and decision in specific terms appear hereafter, but speaking generally we hold: (a) the district court was without jurisdiction to hear this case; (b) the judgment and order of the district court granting a preliminary injunction is vacated and set aside; (c) the regulations of the Department of Health, Education and Welfare (HEW) are valid; (d) by executing compliance forms or their equivalent authorized and required by HEW the State of Alabama does not become a guarantor that third parties with whom it deals will discontinue discrimination on account of race, color or national origin, nor does the execution of such forms or their equivalent result in a contract upon which the Federal Government could institute legal proceedings for the recovery of funds paid to the state; and (e) the order of the Secretary will be enforced in accordance with this opinion subject to the stay of such enforcement as herein ordered and directed.

Title VI, Section 601 of the Civil Rights Act of 1964, 42 U. S. C., § 2000d, provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 602, 42 U. S. C., § 2000d-1, directs "[e]ach Federal department or agency which is empowered to extend Federal financial assistance to any program or activity, . . . to effectuate the provisions of section 601 . . . by issuing rules, regulations, or orders of general applicability. . . ."

Pursuant to the above congressional authorization and directive, the United States Department of Health, Education and Welfare (HEW) promulgated a regulation, 45 C. F. R., Part 80, §§ 80.1-80.13, on November 27, 1964, which became effective after the President's approval on December 3, 1964. In language paralleling section 601, quoted above, § 80.1 of the regulation forbids discrimina-

tion in any program or activity receiving Federal financial assistance from the Department of Health, Education and Welfare. The regulation, at § 80.3 (a) (b), further forbids any recipient of federal funds to engage in certain enumerated discriminatory practices either directly or indirectly. In addition, § 80.3 (b) (2) of the regulation provides that recipients, in determining the kinds of services or benefits they will provide under any program of federal financial assistance may not directly or indirectly utilize criteria or methods of administration which are discriminatory.

The regulation also requires, at § 80.4 (b), the following statement of compliance:

> "Every application by a State or a State agency to carry out a program involving continuing Federal financial assistance . . . shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is . . . conducted in compliance with all requirements imposed by or pursuant to this part, or a statement of the extent to which it is not, at the time the statement is made, so conducted, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this part, including methods of administration which give reasonable assurance that any noncompliance indicated in the statement under subparagraph (1) of this paragraph will be corrected." 45 C. F. R., Part 80, § 80.4 (b) (1964).

Essentially this provision requires the State agency to issue a statement that it will administer it programs non-

discriminatorily and if discrimination is being practiced, it was to be outlined in the statement along with appropriate methods for its correction. If the State agency refuses to submit the assurance described above, the regulation at § 80.8 (b) authorizes the termination of Federal financial assistance in accordance with prescribed procedures.

The Alabama State Department of Pensions and Security is the State agency responsible for administering and supervising the administration of four Public Assistance programs and in addition, one program for Child Welfare Services. The State plans covering these programs have been approved for the receipt of Federal financial assistance under the following titles of the Social Security Act, as amended, 42 U. S. C., §§ 301-306, 601-609, 721-728, 1201-1206, 1351-1355:

Title I —Old-Age Assistance and Medical Assistance to the Aged. (Known in Alabama as "Old-Age Pension and Medical Assistance to the Aged.")

Title IV —Aid to Families with Dependent Children. (Known in Alabama as "Aid to Dependent Children.")

Title V

(Part 3) —Child Welfare Services.

Title X —Aid to the Blind.

Title XIV—Aid to the Permanently and Totally Disabled.

Accordingly, the Alabama Department has received and continues to receive such assistance in furtherance of such programs.

After adoption of the HEW regulation, copies were sent to each state welfare agency along with information concerning relevant portions of the regulation. In addition,

HEW sent to all state agencies administering approved public assistance plans a handbook which outlined the state agency's responsibilities, explained the assurance requirement, and contained a suggested sample assurance form. By August 1965, **every state except Alabama** had filed an assurance accepted by HEW as adequate under § 80.4(b).

Efforts to negotiate with the Alabama Department so as to bring that agency into voluntary compliance with the regulation were extensive. Needless to say they were unproductive. On August 17, 1965, the Commissioner of Welfare formally advised the Alabama Department of its noncompliance and, acting under section 602 of the Civil Rights Act and §§ 80.8(c) and 80.9 of the regulation, the Commissioner offered the Alabama Department an opportunity for an administrative hearing.

Three days later the Alabama Department sent to the Commissioner by letter a statement of "compliance with Title VI of the Federal Civil Rights Act of 1964." While the letter stated that there were no discriminatory practices in the use of physical facilities of the Alabama Department or the offices of County Departments which are located in buildings under the control of the State, it indicated that discrimination existed in the physical arrangement of county offices which are furnished office space by local governing bodies. Also the letter pointed out that segregation existed in some institutions, agencies and organizations such as hospitals, nursing homes, children's institutions, and training schools, who by contract or other arrangement with the Alabama Department dispense aid, care, services and other benefits to recipients of the various programs. The Commissioner found that the letter could not be accepted as an adequate statement of compliance. The primary objections were that although the Alabama Department's statement of compliance indicated that some of the private institutions, agencies and organi-

zations which provide services under the Federally-assisted programs do so on a discriminatory basis, the statement did not indicate what methods the Alabama Department would implement to correct this situation. Nor had the Alabama Department taken appropriate action to determine the extent of noncompliance of these third-parties.[2]

An evidentiary hearing was held on October 21, 1965, at which time the hearing examiner considered Alabama's objections[3] to the requirement that it sign a statement of compliance. The examiner found that the Alabama Department had not submitted an adequate statement of compliance which met the requirements of § 80.4(b) of the regulation and recommended termination of Federal financial assistance to the State of Alabama. The Examiner's decision was adopted by the Commissioner and on January 12, 1967, the Secretary of Health, Education and Welfare, approved the Commissioner's decision and ordered termination of Federal funds to the Alabama Department, effective midnight February 28, 1967.

The State of Alabama for and in behalf of and as trustee for the Alabama Department of Pensions and Security[4] brought suit in the district court on January 13,

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[2] The term third parties is used to refer to the private hospitals, child care centers, nursing homes, physicians, etc. which participate in the state programs by providing services to beneficiaries of the various Alabama welfare programs. The State of Alabama and HEW have also referred to those persons, institutions and agencies as third party vendors.

[3] Since Alabama has presented to us substantially the same objections, which are dealt with extensively later in this opinion, we will not detail them here.

[4] The State of Alabama subsequently amended its complaint to join four individuals receiving public assistance from the Alabama Department of Pensions and Security of the State of Alabama as parties plaintiff on behalf of themselves and on behalf of all persons receiving public assistance benefits under Title 49, Alabama Code of 1940 (recompiled 1958). These four individuals assert that they will suffer a legal wrong if

1967, invoking its jurisdiction under 28 U. S. C., § 1331 and the Administrative Procedure Act, § 10, 5 U. S. C., § 1009(a)(1964), now 5 U. S. C., § 702 (1966), challenging the validity of the Secretary's order and the underlying regulation requiring the submission of the assurance as a condition of continuing to receive Federal financial assistance. The Secretary filed a motion to dismiss asserting that the United States Court of Appeals for the Fifth Circuit had exclusive jurisdiction to review the action of the Secretary. The district court granted Alabama's motion for a preliminary injunction on the ground "that in each and every program irreparable injury and damage will be done if the cutoff of Federal funds becomes effective, . . ." The Secretary filed a notice of appeal and Alabama filed in this court a petition for direct review of the

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Federal funds are terminated and that they are aggrieved within the meaning of 5 U. S. C., § 702 (1966), formerly 5 U. S. C., § 1009 (a) (1964), and within the meaning of Title VI of the Civil Rights Act of 1964, 42 U. S. C., § 2000d-2 (1964). The district court allowed the filing of the amendment over the Secretary's objection that the four individuals did not have standing to sue. The nature of the amendment, its time of filing and notice to the Government is reflected by the following excerpt from the court's order:

> "At the beginning [February 1, 1967] of the hearing plaintiff asked leave to file a second amendment to the complaint joining four individual parties as plaintiff, alleging that each was a recipient of public welfare funds in Alabama and eligible therefor, and that all four were residents of Jefferson County in the Northern District of Alabama. The amendment, by its terms, was a class suit for the benefit of all welfare recipients throughout the state, upon averment that they were so numerous that it was impracticable to name them in the suit, in effect. In this amendment the individual plaintiffs alleged that they adopted the allegations of the complaint theretofore filed. Upon inquiry, the Department of Justice attorneys, representing the Secretary, stated that they had received a copy of the amendment the night before and made known to the Court that defendant does not consent to the filing that it was at least questionable whether the individuals had standing to sue. The Court allowed the filing of this amendment."

Secretary's order invoking jurisdiction under Title XI, § 1116 of the Social Security Act, 42 U. S. C., § 1316, and Section 603 of the Civil Rights Act, 42 U. S. C., § 2000d-2, with respect to four of the five welfare programs. Alabama's petition for review contended that jurisdiction to review the Secretary's order with respect to all five programs was properly in the district court, but that "in the alternative, . . . if under the statutes the United States Court of Appeals for the Fifth Circuit has sole jurisdiction over the four welfare programs . . . such a review is hereby sought. . . ." As stated, the appeal and the petition were consolidated.

Initially we are confronted with the question of jurisdiction. Alabama submits that the district court has jurisdiction to review the Secretary's order. It is contended by the Secretary that this court has sole and exclusive jurisdiction. However, Alabama also suggests that if this court has exclusive jurisdiction, such jurisdiction relates only to four out of the five state programs. After a careful study of the applicable statutes we conclude that the Court of Appeals has sole and exclusive jurisdiction to review the Secretary's order as it applies to all five programs, and having reviewed the same we find that the order and regulation are valid.

I.

Section 603 of the Civil Rights Act provides that any "agency action taken pursuant to section 2000d-1 of this title [§ 602] shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds." If judicial review has not been provided, section 603 states that agency action terminating Federal funds for failure to comply with any requirement imposed pursuant to section 602 may be reviewed in accordance with the Administra-

tive Procedure Act, § 10, which provides for review in any court specified by statute or in the absence or inadequacy thereof ". . . in a court of competent jurisdiction." 5 U. S. C., § 703 (1966), formerly 5 U. S. C. § 1009(b) (1964).

The Social Security Act specifically provides for judicial review of agency action terminating federal money under four out of the five titles involved in this litigation, Titles I, IV, X and XIV. Title XI, § 1116 of the Social Security Act, 42 U. S. C., 1316(a)(3), declares that such judicial review is to be had in the court of appeals for the circuit in which the state is located. We quote:

> "Any State which is dissatisfied with . . . a final determination of the Secretary under section 304, 604, 1204, 1354, 1384 or 1396(c) of this title may . . . file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination."

Consequently, since section 603 of the Civil Rights Act states that termination of funds under 602 is reviewable in the same manner as may be provided for review of the termination of funds under other sections of the Social Security Act, and since such review has been provided, jurisdiction to review the Secretary's order as it relates to the assistance programs under Titles I, IV, X and XIV has been specifically placed by statute in this Court.

We also conclude that the jurisdiction conferred upon this Court by section 603 of the Civil Rights Act of 1964 and 42 U. S. C., § 1316 to review the Secretary's order is sole and exclusive. It is well settled that if Congress, as here, specifically designates a forum for judicial review of administrative action, that form is exclusive. **Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.**, 379 U. S. 411, 85 S. Ct. 551, 13 L. ed. 2d 386 (1965); **Fletcher v. A. E. C.**, 192 F. 2d 29 (D. C. Cir. 1951), cert. den., 342 U. S. 914 (1952). And this result does not depend on

Congress using the word "exclusive" in the statute providing for a forum for judicial review. **Whitney Bank v. New Orleans Bank,** *supra*; **Black River Valley Broadcasts, Inc. v. McNinch,** 101 F. 2d 235 (D. C. Cir.), cert. den., 307 U. S. 623 (1938).

The State of Alabama attacks the statutory review established by section 603 of the Civil Rights Act of 1964 and the Social Security Act, 42 U. S. C. 1316, on the basis that the reference in the Civil Rights Act to "judicial review as may otherwise be provided by law" is limited to judicial review already in existence when the Civil Rights Act was enacted. Since the provisions of 42 U. S. C., § 1316 were not enacted until July 30, 1965, well after the passage of the Civil Rights Act, Alabama argues they are inapplicable. We see no merit in this strained interpretation of section 603. The language of the statute does not say such judicial review as may **already** have been provided. Further, we do not think the legislative history of section 603 supports Alabama's contention that the section is to be read in such a limited manner. Rather, we think, had Congress meant to restrict review of agency action taken pursuant to section 602 solely to methods of judicial review already in existence, it would have specifically stated that such was its intention.

Title V (part 3) of the Social Security Act relates to child welfare services and only involves about one million of the hundred million in federal funds which were terminated by the Secretary's order. The Social Security Act does not provide for judicial review of the termination of funds under this Title. This silence is the basis of Alabama's claim that it can seek review in the district court of the Secretary's order as it relates to all five titles. Alabama contends that since no provision is made for judicial review in the Social Security Act, under section 603 of Title VI of the Civil Rights Act and § 10 of the Administrative Procedure Act, review of the Secretary's

order with respect to Title V (part 3), child welfare services, must be in the district court. Consequently, Alabama asserts, the statutory review provided by 42 U. S. C., § 1316 for the other four titles involved in this litigation is "inadequate" since such provisions do not cover the entire case as initiated by the State of Alabama. In view of our finding that the district court was without jurisdiction to review the Secretary's order with respect to Title V (part 3) we do not reach the question of "inadequacy". Our decision that we have sole and exclusive jurisdiction to review the Secretary's order as it relates to all five programs is based on a consideration of the nature of the several welfare programs and sensible judicial administration. In view of these considerations we construe section 603 provided for judicial review "as may otherwise be provided by law for similar action taken by such department or agency on other grounds," and 42 U. S. C., § 1316 to vest in this court by implication the authority to review the Secretary's order with respect to Title V (part 3).

Titles I, IV, X and XIV of the Social Security Act are concerned with state agencies operating and administering certain state-wide programs. Any federal administrative action taken against an agency affecting state-wide operations should be subject to speedy and final judicial review. Consequently, review of the state programs under Titles I, IV, X and XIV is in the courts of appeals. Title V (part 3), like the other four titles, is also concerned with a state-wide program, child welfare, and requires the state agency to submit a state plan as a condition to eligibility for federal funds. Hence, federal action taken against such state agency under Title V (part 3) should be subject to the same review provisions.

The only specific Congressional authorization in the Social Security Act that review be in the district court is where benefits are terminated under Title II of the Act

dealing with federal old-age survivors and disability payments. 42 U. S. C., § 405 (g). Such review was placed in the district court because logically the complainant in a Title II proceeding would be a private individual of modest means. This reasoning is wholly inapplicable to Title V (part 3) where normally the state would be the complaining party.

It must also be noted that Title V (part 3) is closely related to the child welfare services provided to needy families under Title IV. One requirement of a child welfare plan under Title V (part 3) is that it must provide for adequate coordination with the child welfare programs under Title IV (Aid to Dependent Children). 42 U. S. C., § 723 (a) (1) (A). The aim of these two programs, working closely together, is to provide proper and adequate services for the children and their families under these state programs. Since the statute expressly vests review of Title IV in this court, economic judicial administration suggests that the two programs should be reviewed together. Both are essentially a part of each other and are inevitably tied together.

Therefore, consistent with sound principles of judicial administration and the overall scheme of judicial review set forth in section 603 of the Civil Rights Act and the Social Security Act, 42 U. S. C., § 1316, we conclude that this court has sole and exclusive jurisdiction to review the Secretary's order as it relates to all five state programs.

Subsequent to oral argument in this case the Supreme Court decided the cases, **Toilet Goods Ass'n v. Gardner**, 35 U. S. L. W. 4431; **Abbott Laboratories v. Gardner**, 35 U. S. L. W. 4433; and **Gardner v. Toilet Goods Ass'n**, 35 U. S. L. W. 4439 (May 22, 1967). Alabama contends that such decisions support their contention that the district court has jurisdiction of the Secretary's order with re-

spect to all five titles. We disagree. The issue before the court in the above cases was whether the validity of certain regulations promulgated by the Commissioner of Food and Drugs could be attacked prior to enforcement in light of the fact that the Federal Food, Drug and Cosmetic Act, 21 U. S. C., § 301, et seq., contained no specific provisions for review of the subject regulations. Further the court was faced with the issue of whether the questions presented were ripe for judicial resolution. The court found nothing in the Food, Drug and Cosmetic Act which barred a pre-enforcement suit under the Administrative Procedure Act, 5 U. S. C., §§ 701-704 (1966), formerly 5 U. S. C., § 1009 (1964), and the Declaratory Judgment Act, 28 U. S. C., § 2201, and also found the controversies presented in **Abbott Laboratories** and **Gardner v. Toilet Goods** ripe for adjudication. The parties did not raise the question of whether the court of appeals was the proper court to review the validity of the regulations in issue, as opposed to the district court. In fact the Government consistently argued that they could not be reviewed in any court prior to enforcement. Consequently the court did not rule specifically on this question. Furthermore, since no specific judicial review had been authorized, we do not interpret the court's decisions as holding that if the Act had contained such provisions, they could be ignored leaving the parties free to bring an action under other statutes providing methods of review. Therefore, we find these decisions inapplicable to the issues before us.

The action of the State of Alabama in joining four private individuals[5] as parties plaintiff in the suit filed in the district court, does not defeat the sole and exclusive jurisdiction of this court granted by statute over actions brought by a State to review an order terminating

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[5] See footnote No. 4, supra.

Federal funds to a state agency. Whether such individuals may bring a separate cause of action, have standing to sue, or may properly be joined with the State of Alabama in its petition for direct review by this court are issues which are not before us. We merely hold that the district court did not have jurisdiction over the action originally filed by the State of Alabama, since the applicable statutes dictate that this court is the proper court for review of the Secretary's order, and that jurisdiction was not conferred on the district court in the action brought by Alabama by the joinder of private litigants in the circumstances here present.

II.

Alabama's attack on the validity of the regulation, 45 C. F. R. Part 80, §§ 80.1-80.13 is primarily directed at § 80.3 (b) and paragraphs 1 and 4 of the sample statement of compliance form issued by the Department of Health, Education and Welfare, 45 C. F. R., § 80.3 (b) states in pertinent part:

> "**Specific Discriminatory actions prohibited.**
>
> (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:
>
> (i) Deny an individual any service, financial aid, or other benefit provided under the program;
>
> (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
>
> (iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;"

Paragraph 1, entitled Scope, of the compliance form is as follows:

> "The State plan is being . . . and will continue to be administered in such manner that no person in the United States will, on the ground of race, color, or national origin, be excluded from participation in, be denied any aid, care, services, or other benefits of, or be otherwise subjected to discrimination in, the program under the State plan, . . ."

Paragraph 4 of the form reads:

> "**Other Agencies, Institutions, Organizations, and Contractors**
>
> The State agency will take such steps as necessary to assure that any other agency, institution or organization participating in the program, through contractual or other arrangements, will comply with the Act and Regulation."

Alabama interprets these provisions, particularly paragraph 4, as requiring it to guarantee that third party vendors such as private physicians, private nursing homes, or private institutions and church homes assuming the care of children, will completely integrate themselves. Therefore, Alabama reasons that if it signs the compliance form, it will be guaranteeing that no federal funds will be disbursed to third parties which maintain segregated operations and consequently it must discontinue payment of funds to those who still practice segregation. Alabama then points out that this would deprive needy people of their benefits for it could be and often is the fact that the only health or welfare facilities in any particular county are segregated. Furthermore, Alabama contends that it has no authority over private persons, health institutions and agencies and would have no authority to see that compliance was effected. Thus, it is contended that the

State would be making a guaranty which it could not perform.

Alabama submits that the requirement in the compliance form that Alabama detail areas of segregation presently existing and outline the methods whereby the state agency will take steps to eliminate this condition supports its interpretation that the statement of compliance is a guaranty. It points out that during the hearings in Washington, Alabama inquired whether the state would be required to bring segregated facilities into compliance. A Government witness answered:

> "This is correct. The state plan material is required to set forth the situation in the state, and the state plan and time limit, the purpose of that and the other regulation was to provide assurance that within a reasonable time the state would not only take steps it would accomplish compliance with the Civil Rights Act, but there is no specific deadline set forth in the regulation nor in the handbooks of the two bureaus."

Alabama also expresses the fear that the compliance form might well be construed as a contractual obligation and undertaking upon which action might later be brought against it by the Government. Therefore, it is argued, that if Alabama did sign the form and it failed to bring third parties into compliance with the Civil Rights Act, the Government might or could elect to recover from the State agency all of the federal money pre-advanced to the State agency between the time of the signing of the assurance and the time when it may be finally determined that the State agency is unable to bring third parties into compliance.

Finally, section 602 of the Civil Rights Act which empowers HEW to issue rules and regulations provides expressly that any such rules, regulations or order issued "shall be consistent with achievement of the objectives

of the statute authorizing the financial assistance in connection with which the action is taken." Alabama contends that the regulation issued by the Secretary is not consistent with the objectives of the Social Security Act, namely to provide assistance to the poor, needy and aged. For example, Alabama asserts that the quoted statement above was added to section 602 to prevent, for one thing, the termination of school lunch programs in segregated schools.[6]

Thus Alabama argues, that what Congress meant by discrimination is that a state program receiving federal funds could not apply such funds only to white persons, eligible for assistance, but must operate for the benefit of Negro and white alike. Likewise, Alabama contends, that the purpose of the programs under consideration is to treat the sick, and to care for the poor, and so long as the treatment and care are provided for all, and Alabama has consistently and emphatically declared that it provides benefits under its state programs for both Negro

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[6] Alabama relies on the following assertion by Senator Pastore:

> "Let me advise Senators that the failure of a district court to desegregate the schools will not jeopardize the school lunch program; it absolutely will not. Even if a community does not desegregate, that will not jeopardize the school lunch program—unless in that particular school the white children are fed, but the black children are not fed; and I refer Senators to page 33 of the bill, which states very, very clearly: 'which shall be consistent'—in other words, the orders and rules—'shall be consistent with the achievement of the objectives of the statute authorizing financial assistance.'
>
> "We have a school lunch program, and its purpose is to feed, not to desegregate the schools; therefore, that would not be consistent.
>
> . . . . . .
>
> "So we must remember that the shutting-off of a grant must be consistent with the objectives to be achieved. A school lunch program is for the purpose of feeding the school children. If the white children are fed, but the black children are not fed, that is a violation of this law."
>
> 110 Cong. Rec. 13936 (June 19, 1964).

and white, then there is no discrimination under such programs within the meaning of the Civil Rights Act. Therefore, the assurance that there must be desegregated waiting rooms, nursing homes, hospitals and institutions for child care goes beyond the scope of the Civil Rights Act.

In summary, it may be said that Alabama presents three primary arguments against the validity of the regulation. First, that such regulation, in requiring Alabama to sign a statement of compliance form, orders Alabama to either compel private institutions, homes, doctors, etc. to desegregate, which is an impossibility, or deal only with those private facilities which are desegregated and therefore deprive the needy people of Alabama of assistance. Second, that such regulation requires Alabama to enter into a contractual relationship with the Government and if such contract is breached the Government may seek restitution. Third, that the regulation is inconsistent with the objectives of the Social Security Act.

The statement of compliance which the regulation requires Alabama to submit is an assurance that Alabama will operate its state programs on a non-discriminatory basis. The statement of compliance must also identify the areas where racial discrimination is practiced in the administration of the state programs and in the facilities used in these programs and describe proposals for the elimination of such discrimination. Requiring the state agency to submit a plan of operation for its state programs which are assisted by federal funds is normal procedure. Indeed, it has been the traditional procedure. In fact the Social Security Act places the responsibility of formulating and implementing a plan on the state agency, and requires reports from the state agency regarding this performance. A plan must even be submitted and approved by the Secretary before funds are received. Hence the requirement to submit an assurance form is merely an

adaptation of the standard federal-state arrangement by which a state qualifies for federal welfare assistance.

The Secretary has consistently and repeatedly stated that the assurance form is not a guaranty that Alabama will force or compel third parties to desegregate. In its brief and on oral argument the Secretary stated that the assurance form merely commits Alabama to use its best efforts to eliminate racial discrimination, and obligates the Alabama Department to assume the responsibility for taking reasonable steps to eliminate discrimination in facilities and services provided by third parties. Hence, all the Secretary is asking of the Alabama Department is "to try to do something." It has been suggested that such reasonable steps could include persuasion, negotiation and seeking new facilities which would operate on a non-discriminatory basis.

On oral argument the Attorney for Alabama expressed amazement and unbelieving surprise at the statements of the Government counsel that all Alabama had to do was try. Through its counsel, Alabama expressed the thought that such an attitude did not prevail with the Secretary and other high Government officials, that it had not been expressed before, and in the opinion of state counsel, such an attitude would not long endure. However, the Government's interpretation of the assurance form and the expressions of counsel on oral argument are not without foundation. In proceedings before the Commissioner it was stated that the assurance:

> "does not bind the State of Alabama or any of its agents, employees or officers to be a guarantor that care or services to applicants or beneficiaries under a program to which this submittal applies will not be given on a separate, segregated or other discriminatory basis on the ground of race or color."

The Secretary in ruling on Alabama's objection to filing an assurance made the following statements:

"No one has suggested that it [the State] can compel private parties to provide services to Federally-assisted beneficiaries without discrimination.

Our Regulation under Title VI is based upon the premise that most of those providing such services can be persuaded to provide them nondiscriminatorily and to the extent they will not, that Federal funds should not be paid to help perpetuate such discriminatory practices against innocent beneficiaries.

Alternate, acceptable services should be found and developed."

Moreover, the record discloses a willingness on the part of the Secretary to accept assurance from the State in language different from that used in the suggested form so long as the spirit and purpose of such assurance are in accord with the expressed national policy of nondiscrimination.

We hold that the regulation only requires what the Secretary has so often stated that it requires, namely that Alabama assume the responsibility and make a good faith effort toward eliminating racial discrimination in its state-wide federally assisted welfare program. The assurance form is not a guaranty. Nor can it be interpreted to be a contract. If in the future it is determined that Alabama is not making a good faith effort, the statement of compliance cannot be used as the basis of a lawsuit by the Federal Government in order to recover federal money already received and expended by Alabama for its state programs under the Social Security Act. We consider this interpretation to be the position of the Secretary. In any event, our holding and conclusion in this opinion is and will be as binding on the Secretary as it is upon the State of Alabama. Such was the unequivocal and positive assurance of Government counsel on oral argument and we have no reason to doubt such assurance. The briefs of the

Government amply support such assurance.[7] The fears and apprehensions of the State of Alabama should be allayed. The State should now proceed to administer its program to alleviate the suffering and despair of those citizens for whom these beneficent and benevolent pro-

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[7] The following are excerpts from the Government's initial brief in this Court:

"This litigation does not involve the validity of application of the HEW regulation to particular third-party situations or the institution of administrative proceedings for failure by Alabama to take action against particular third parties. Instead, what is at stake in this litigation is only the general question whether the Alabama Department is obliged to assume any responsibility to take reasonable steps to eliminate racial discrimination in facilities and services provided by third parties."

* * * * * * *

"The limited question to be decided by this court is whether HEW can lawfully require the Alabama Department to assume some responsibility for the racial discrimination practiced by third parties in connection with performing services under the state welfare program, or to state the question conversely, whether the Alabama Department is entitled to disclaim *all* responsibility for racial discrimination of these facilities and institutions.

"*Second,* It must be recognized that the HEW regulation does not require the Alabama Department to eliminate racial discrimination practiced by third parties at the risk of having all funds terminated or the assurance breached. What it is asking the Alabama Department to assume is some responsibility for the elimination of racial discrimination practiced by third parties. It is asking the Alabama Department to *try* to do something. Moreover, it is not asking the Alabama Department—any more than it asked all 49 other state welfare departments—to attempt to accomplish something where it has no power to do so and there is no chance of success. The state agency knows which third parties perform services for welfare recipients; it is in a suitable position to report on the extent of noncompliance in such activities; and it can take many steps, including negotiations, to bring about an end to racial discrimination in those institutions and facilities. Indeed, some of these so-called third parties participate in the vendor payment program and, as stated in the Secretary's order, the Alabama Department 'either directly or through other state agencies . . . negotiates or sets the fees which it will pay and . . . is involved—as the Agency itself admits—in at least "helping" make arrangements for medical care "if

grams were designed to help, free of halting fear, distrust and apprehension. Furthermore, if in the future, the Secretary determines that the Alabama Department has failed to make a good faith effort to implement the national policy of non-discrimination in accordance with the views herein expressed, such finding is certainly reviewable by the courts.

We find no merit in Alabama's contention that the regulation is inconsistent with the objectives of the Social Security Act. Under Title VI of the Civil Rights Act, HEW is charged with the responsibility of eliminating racial discrimination in the great variety of welfare programs throughout the nation that are assisted by Federal funds. Such discrimination prohibited by the Civil Rights Act surely includes the practice of providing services to Negroes and whites on a separate but equal basis solely on account of their race. Consequently, Alabama cannot contend that it is not discriminating within the meaning of the Civil Rights Act when it admittedly provides some benefits to Negroes in a manner different from whites, solely on the basis of their race. Furthermore, it is this type of racial discrimination along with all of its other invidious forms which HEW, in the administration of the Social Security Act and the state programs created thereunder, must play its role in trying to eliminate. We therefore believe that not only is striving to end racial injustice an objective of HEW under the Social Security Act, but in light of the deep concern of the Federal Gov-

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requested to do so." ' [R. 28; A. Vol. II, p. 293]." (Emphasis in original.)

* * * * * * * *

"Thus, for these reasons we believe there is no merit to the Alabama Department's contention in that the HEW regulation requiring the submission of an assurance is unlawful because the submission of such an assurance would *commit it to trying to eliminate racial discrimination* in third party facilities that are used as an integral part of the welfare program" (Emphasis added).

ernment toward ending all discrimination, it is one of its primary objectives.

In discharging its responsibility HEW instituted the procedure of requiring the respective states to shoulder the burden of trying to eliminate racial discrimination. It has long been the policy that state programs receiving Federal funds under the Social Security Act must be approved by the federal agency. Consequently, one requirement for approval of state plans is that the State submit a statement of compliance whereby the State obligates itself to do its part toward ending racial discrimination by making a good faith, conscientious and sincere effort to do so. We find this procedure of submitting an assurance form to be particularly appropriate because it conforms to the basic structure of the welfare statute and regulations initially establishing the assistance programs.

The sample assurance form issued by HEW of which a portion was quoted earlier, is indeed a sample. The parties are free to draw up another assurance form in which the wording would, perhaps, be more acceptable to Alabama. We make no effort at suggesting the form it should take. We merely hold that the regulation requires the State to identify the areas where racial discrimination is practiced in its programs, commit itself to assuming the responsibility for making a good faith, conscientious and sincere effort to eliminate such racial discrimination and outline the methods by which it plans to go about that task.

For the foregoing reasons we find the regulation issued by the Secretary valid.[8] Since Alabama is presently in a

[8] Such conclusion is based not only on our finding that the State of Alabama's objections to the regulation issued by the Secretary are without merit but also upon our finding that the Secretary in issuing such regulation was clearly acting within its rule-making power conferred upon it by statute. S. E. C. v. Chenery Corp., 332

state of non-compliance with this regulation, the validity of the order of the Secretary terminating funds to the Alabama Department must be upheld. However, in the interest of justice, issuance of our judgment is stayed for 30 days from the date of the release of this opinion in order to afford the parties an opportunity to eliminate their controversies and to proceed in accordance with this opinion. See **Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.**, *supra*. Our review of the record convinces us that neither the Federal Government nor the State of Alabama desires to pursue a course of action which is contrary to national policy resulting in a loss of funds involved in this litigation. It is assumed, and devoutly to be hoped, that both Governments will fully cooperate and solve the impasse which has developed before the expiration of the stay herein ordered and directed; and that Alabama will have submitted an adequate statement of compliance in accordance with this opinion.

The order and judgment of the district court granting a preliminary injunction is vacated and set aside. The order of the Secretary will be enforced in accordance with the views herein expressed.

U. S. 194, 91 L. ed. 1995 (1946); National Broadcasting Co. v. United States, 319 U. S. 190, 87 L. ed. 1344 (1942); Phelps Dodge Corp. v. NLRB, 313 U. S. 177, 85 L. ed. 1271 (1940); A. T. & T. v. United States, 299 U. S. 232, 81 L. ed. 142 (1936).

APPENDIX D.

Reprinted from the Federal Register, Friday, December 4, 1964.

U. S. Department of Health, Education, and Welfare.

Title 45—Public Welfare.

Subtitle A—Department of Health, Education, and Welfare, General Administration.

Part 80—Nondiscrimination in Federally-Assisted Programs of the Department of Health, Education, and Welfare-Effectuation of Title VI of the Civil Rights Act of 1964.

Subtitle A 45 CFR is hereby amended by adding the following new Part 80:

Sec.

80.1 Purpose.
80.2 Application of this part.
80.3 Discrimination prohibited.
80.4 Assurances required.
80.5 Illustrative applications.
80.6 Compliance information.
80.7 Conduct of investigations.
80.8 Procedure for effecting compliance.
80.9 Hearings.
80.10 Decisions and notices.
80.11 Judicial review.
80.12 Effect on other regulations; forms and instructions.
80.13 Definitions.

Authority: The provisions of this Part 80 are issued under Sec. 602, 78 Stat. 252, and the laws referred to in Appendix A.

§ 80.1 Purpose.

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the "Act") to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Health, Education, and Welfare.

§ 80.2 Application of this part.

This part applies to any program for which Federal financial assistance is authorized under a law administered by the Department, including the Federally-assisted programs and activities listed in Appendix A of this part. It applies to money paid, property transferred, or other Federal financial assistance extended under any such program after the effective date of the regulation pursuant to an application approved prior to such effective date. This part does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred, or other assistance extended under any such program before the effective date of this part, (c) any assistance to any individual who is the ultimate beneficiary under any such program, or (d) any employment practice, under any such program, of any employer, employment agency, or labor organization, except to the extent described in § 80.3. The fact that a program or activity is not listed in Appendix A shall not mean, if Title VI of the Act is otherwise applicable, that

such program is not covered. Other programs under statutes now in force or hereinafter enacted may be added to this list by notice published in the Federal Register.

§ 80.3 Discrimination prohibited.

(a) **General.** No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

(b) **Specific discriminatory actions prohibited.** (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

(3) As used in this section the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefit provided in or through a facility provided with the aid of Federal financial assistance.

(4) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(c) **Employment practices.** Where a primary objective of the Federal financial assistance to a program to which this part applies is to provide employment, a recipient

may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the unemployment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of severe handicaps cannot be readily absorbed in the competitive labor market. The following programs under existing laws have one of the above objectives as a primary objective:

(a) Department projects under the Public Works Acceleration Act, Public Law 87-658.

(b) Community work and training programs under Title IV of the Social Security Act, 42 U. S. C. 609.

(c) Work-study program under the Vocational Education Act of 1963, P. L. 88-210, sec. 13.

(d) Programs listed in Appendix A as respects employment opportunities provided thereunder, or in facilities provided thereunder, which are limited, or for which preference is given, to students, fellows, or other persons in training for the same or related employments.

(e) Establishment of sheltered workshops under the Vocational Rehabilitation Act, 29 U. S. C. 32-34.

The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Executive Order 11114.

(d) **Indian Health and Cuban Refugee programs.** An individual shall not be deemed subjected to discrimination by reason of his exclusion from the benefits of a program limited by Federal law to individuals of a particular race, color, or national origin different from his.

(e) **Medical emergencies.** Notwithstanding the foregoing provisions of this section, a recipient of Federal financial assistance shall not be deemed to have failed to comply with paragraph (a) of this section if immediate provision of a service or other benefit to an individual is necessary to prevent his death or serious impairment of his health, and such service or other benefit cannot be provided except by or through a medical institution which refuses or fails to comply with paragraph (a) of this section.

§ 80.4 Assurances required.

(a) **General.** (1) Every application for Federal financial assistance to carry out a program to which this part applies, except a program to which paragraph (b) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. In the case of an application for Federal financial assistance to provide real property or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for a

purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In the case of personal property the assurance shall obligate the recipient for the period during which he retains ownership or possession of the property. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application. The responsible Department official shall specify the form of the foregoing assurances for each program, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other participants in the program. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) The assurance required in the case of a transfer of surplus real property shall be inserted in the instrument effecting the transfer of any such surplus land, together with any improvements located thereon, and shall consist of (i) a condition coupled with a right to be reserved to the Department to revert title to the property in the event of breach of such nondiscrimination condition during the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits, and (ii) a covenant running with the land for the same period. In the event a transferee of surplus real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on such property for the purposes for which the property was transferred, the Secretary may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to forbear the exer-

cise of such right to revert title for so long as the lien of such mortgage or other encumberance remains effective.

(b) **Continuing State programs.** Every application by a State or a State agency to carry out a program involving continuing Federal financial assistance to which this part applies (including the programs listed in Part 2 of Appendix A) shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this part, or a statement of the extent to which it is not, at the time the statement is made, so conducted, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this part, including methods of administration which give reasonable assurance that any noncompliance indicated in the statement under subparagraph (1) of this paragraph will be corrected.

(c) **Elementary and secondary schools.** The requirements of paragraph (a) or (b) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school system which the

Commissioner of Education determines is adequate to accomplish the purposes of the Act and this part, and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the Commissioner may reserve the right to redetermine, after such period as may be specified by him, the adequacy of the plan to accomplish the purposes of the Act and this part. In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such plan shall be revised to conform to such final order, including any future modification of such order.

(d) **Assurances from institutions.** (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for a special training project, for a student loan program, or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program. If in any such case the assistance sought is for the construction of a facility

or part of a facility, the assurance shall in any event extend to the entire facility and to facilities operated in connection therewith.

§ 80.5 Illustrative applications.

The following examples will illustrate the application of the foregoing provisions to some of the major programs of the Department. (In all cases the discrimination prohibited is discrimination on the ground of race, color, or national origin prohibited by title VI of the Act and this part, as a condition of the receipt of Federal financial assistance.)

(a) In grant programs which support the provision of health or welfare services, discrimination in the selection or eligibility of individuals to receive the services, and segregation or other discriminatory practices in the manner of provided them, are prohibited. This prohibition extends to all facilities and services provided by the grantee under the program or, if the grantee is a State, by a political subdivision of the State. It extends also to services purchased or otherwise obtained by the grantee (or political subdivision) from hospitals, nursing homes, schools, and similar institutions for beneficiaries of the program, and to the facilities in which such services are provided, subject, however, to the provisions of § 80.3 (e).

(b) In the Federally-affected area programs (P. L. 815, and P. L. 874) for construction aid and for general support of the operation of elementary or secondary schools, or in programs for more limited support to such schools such as for the acquisition of equipment, the provision of vocational education, or the provision of guidance and counseling services, discrimination by the recipient school district in any of its elementary or secondary schools in the admission of students, or in the treatment of its students in any aspect of the educational process, is pro-

hibited. In this and the following illustrations the prohibition of discrimination in the treatment of students or other trainees includes the prohibition of discrimination among the students or trainees in the availability or use of any academic, dormitory, eating, recreational, or other facilities of the grantee or other recipient.

(c) In a research, training, demonstration, or other grant to a university for activities to be conducted in a graduate school, discrimination in the admission and treatment of students in the graduate school is prohibited, and the prohibition extends to the entire university unless it satisfies the responsible Department official that practices with respect to other parts or programs of the university will not interfere, directly or indirectly, with fulfillment of the assurance required with respect to the graduate school.

(d) In a training grant to a hospital or other nonacademic institution, discrimination is prohibited in the selection of individuals to be trained and in their treatment by the grantee during their training. In a research or demonstration grant to such an institution discrimination is prohibited with respect to any educational activity and any provision of medical or other services and any financial aid to individuals incident to the program.

(e) In grant programs to assist in the construction of facilities for the provision of health, educational or welfare services assurances will be required that services will be provided without discrimination, to the same extent that discrimination would be prohibited as a condition of Federal operating grants for the support of such services. Thus, as a condition of grants for the construction of academic, research, or other facilities at institutions of higher education, assurances will be required that there will be no discrimination in the admission or treatment of students. In the case of hospital construction

grants the assurance will apply to patients, to interns, residents, student nurses, and other trainees, and to the privilege of physicians, dentists, and other professionally qualified persons to practice in the hospital, and will apply to the entire facility for which, or for a part of which the grant is made, and to facilities operated in connection therewith. In other construction grants the assurances required will similarly be adapted to the nature of the activities to be conducted in the facilities for construction of which the grants have been authorized by Congress.

(f) Upon transfers of real or personal surplus property for health or educational uses, discrimination is prohibited to the same extent as in the case of grants for the construction of facilities or the provision of equipment for like purposes.

(g) Each applicant for a grant for the construction of educational television facilities is required to provide an assurance that it will, in its broadcast services, give due consideration to the interests of all significant racial or ethnic groups within the population to be served by the applicant.

(h) A recipient may not take action that is calculated to bring about indirectly what this part forbids it to accomplish directly. Thus a State, in selecting or approving projects or sites for the construction of public libraries which will receive Federal financial assistance, may not base its selections or approvals on criteria which have the effect of defeating or of substantially impairing accomplishment of the objectives of the Federal assistance program as respects individuals of a particular race, color, or national origin.

§ 80.6 Compliance information.

(a) **Cooperation and assistance.** Each responsible Department official shall to the fullest extent practicable

seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) **Compliance reports.** Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) **Access to sources of information.** Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information, the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information.

(d) **Information to beneficiaries and participants.** Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the program under which the recipient receives Federal financial assistance, and make such information available

to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

§ 80.7 Conduct of investigations.

(a) **Periodic compliance reviews.** The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) **Complaints.** Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 90 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) **Investigations.** The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) **Resolution of matters.** (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever

possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

(2) If an investigation does not warrant action pursuant to subparagraph (1) of this paragraph the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) **Intimidatory or retaliatory acts prohibited.** No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

§ 80.8 Procedure for effecting compliance.

(a) **General.** If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) **Noncompliance with § 80.4.** If an applicant fails or refuses to furnish an assurance required under § 80.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) **Termination of or refusal to grant or to continue Federal financial assistance.** No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the action has been approved by the Secretary pursuant to § 80.10 (e), and (4) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) **Other means authorized by law.** No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the action has been approved by the Secretary, (3) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (4) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

§ 80.9 Hearings.

(a) **Opportunity for hearing.** Whenever an opportunity for a hearing is required by § 80.8 (c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date or such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing under this paragraph or to appear at a hearing for which

a date has been set shall be deemed to be a waiver of the right to a hearing under Section 602 of the Act and § 80.8 (c) of this part and consent to the making of a decision on the basis of such information as is available.

(b) **Time and place of hearing.** Hearings shall be held at the offices of the Department in Washington, D. C., at a time fixed by the responsible Department official unless he determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before the responsible Department official or, at his discretion, before a hearing examiner designated in accordance with Section 11 of the Administrative Procedure Act.

(c) **Right to counsel.** In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) **Procedures, evidence, and record.** (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with Sections 5-8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests or findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to

test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) **Consolidated or Joint Hearings.** In cases in which the same or related facts are asserted to constitute noncompliance with this regulation with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under Title VI of the Act, the Secretary may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 80.10.

§ 80.10 Decisions and notices.

(a) **Decision by person other than the responsible Department official.** If the hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the responsible Department official for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient. Where

the initial decision is made by the hearing examiner the applicant or recipient may within 30 days of the mailing of such notice of initial decision file with the responsible Department official his exceptions to the initial decision, with his reasons therefor. In the absence of exceptions, the responsible Department official may on his own motion within 45 days after the initial decision serve on the applicant or recipient a notice that he will review the decision. Upon the filing of such exceptions or of such notice of review the responsible Department official shall review the initial decision and issue his own decision thereon including the reasons therefor. In the absence of either exceptions or a notice of review the initial decision shall constitute the final decision of the responsible Department official.

(b) **Decisions on record or review by the responsible Department official.** Whenever a record is certified to the responsible Department official for decision or he reviews the decision of a hearing examiner pursuant to paragraph (a) of this section, or whenever the responsible Department official conducts the hearing, the applicant or recipient shall be given reasonable opportunity to file with him briefs or other written statements of its contentions, and a copy of the final decision of the responsible Department official shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) **Decisions on record where a hearing is waived.** Whenever a hearing is waived pursuant to § 80.9 (a) a decision shall be made by the responsible departmental official on the record and a copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) **Rulings required.** Each decision of a hearing officer or responsible Department official shall set forth his ruling on each finding, conclusion, or exception presented,

and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) **Approval by Secretary.** Any final decision of a responsible Department official (other than the Secretary) which provides for the suspension or termination of, or the refusal to grant or continue Federal financial assistance, or the imposition of any other sanction available under this part of the Act, shall promptly be transmitted to the Secretary, who may approve such decision, may vacate it, or remit or mitigate any sanction imposed.

(f) **Content of orders.** The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, under the program involved, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this part, including provisions designed to assure that no Federal financial assistance will thereafter be extended under such program to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this part, or to have otherwise failed to comply with this part, unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this part.

§ 80.11 Judicial review.

Action taken pursuant to Section 602 of the Act is subject to judicial review as provided in Section 603 of the Act.

§ 80.12 Effect on other regulations; forms and instructions.

(a) **Effect on other regulations.** All regulations, orders, or like directions heretofore issued by any officer of the

Department which impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this part applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of such assistance under such program for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this part, except that nothing in this part shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this part. Nothing in this part, however, shall be deemed to supersede any of the following (including future amendments thereof): (1) Executive Orders 10925 and 11114 and regulations issued thereunder, (2) the "Standards for a Merit System of Personnel Administration," issued jointly by the Secretaries of Defense, of Health, Education, and Welfare, and of Labor, 28 F. R. 734, or (3) Executive Order 11063 and regulations issued thereunder, or any other regulations or instructions, insofar as such Order, regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in any program or situation to which this part is inapplicable, or prohibit discrimination on any other ground.

(b) **Forms and instructions.** Each responsible Department official shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part as applied to programs to which this part applies and for which he is responsible.

(c) **Supervision and coordination.** The Secretary may from time to time assign to officials of the Department, or

to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of Title VI of the Act and this part (other than responsibility for final decision as provided in § 80.10), including the achievement of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of Title VI and this part to similar programs and in similar situations.

§ 80.13 Definitions.

As used in this part—

(a) The term "Department" means the Department of Health, Education, and Welfare, and includes each of its operating agencies and other organizational units.

(b) The term "Secretary" means the Secretary of Health, Education, and Welfare.

(c) The term "responsible Department official" with respect to any program receiving Federal financial assistance means the Secretary or other official of the Department who by law or by delegation has the principal responsibility within the Department for the administration of the law extending such assistance.

(d) The term "United States" means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term "State" means any one of the foregoing.

(e) The term "Federal financial assistance" includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease

of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(f) The term "program" includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training, health, welfare, rehabilitation, housing, or other services, whether provided through employees of the recipient of Federal financial assistance or provided by others through contracts or other arrangements with the recipient, and including work opportunities and cash or loan or other assistance to individuals), or for the provision of facilities for furnishing services, financial aid or other benefits to individuals. The services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any services, financial aid, or other benefits provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property, or other resources required to be expended or made available for the program to meet matching requirements or other conditions which must be met in order to receive the Federal financial assistance, and to include any services, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance or such non-Federal resources.

(g) The term "facility" includes all or any portion of structures, equipment, or other real or personal property or interests therein, and the provision of facilities in-

cludes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

(h) The term "recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.

(i) The term "primary recipient" means any recipient which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

(j) The term "applicant" means one who submits an application, request, or plan required to be approved by a responsible Department official, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and the term "application" means such an application, request, or plan.

Effective date. This part shall become effective on the 30th day following the date of its publication in the Federal Register.

Dated: November 27, 1964.

[Seal]

Anthony J. Celebrezze,
Secretary of Health, Education,
and Welfare.

Approved: December 3, 1964.

Lyndon B. Johnson.

Appendix A.

Programs to Which This Part Applies.

Part 1. Programs other than State-administered continuing programs.

1. Experimental hospital facilities (sec. 624, Public Health Service Act, 42 U. S. C. 291n).

2. Health research facilities (title VII, part A, Public Health Service Act, 42 U. S. C. 292-292j).

3. Teaching facilities for medical, dental, and other health personnel (title VII, part B, Public Health Service Act, 42 U. S. C. 293-293h; secs. 801-804, Public Health Service Act, 42 U. S. C. 296, 296a-c).

4. Mental retardation research facilities (title VII, part D, Public Health Service Act, 42 U. S. C. 295-295e).

5. University affiliated mental retardation facilities (part B, Mental Retardation Facilities Construction Act, 42 U. S. C. 2661-2665).

6. Heart disease laboratories and related facilities for patient care (sec. 412 (d), Public Health Service Act, 42 U. S. C. 287a (d)).

7. Municipal Sewage Treatment Works (sec. 6, Federal Water Pollution Control Act, 33 U. S. C. 466e).

8. Loans for acquisition of science, mathematics, and foreign language equipment (title III, National Defense Education Act, 20 U. S. C. 445).

9. Construction of facilities for institutions of higher education (Higher Education Facilities Act, 20 U. S. C. 701-757).

10. School construction in Federally-affected areas (20 U. S. C. 631-645).

11. Educational television broadcasting facilities (47 U. S. C. 390-397).

12. Surplus real and related personal property disposal (40 U. S. C. 484 (k)).

13. George Washington University Hospital construction (76 Stat. 83, P. L. 87-460, May 31, 1962).

14. Loan service of captioned films for the deaf (42 U. S. C. 2491-2494).

15. Residential vocational education schools (20 U. S. C. 351).

16. Department projects under the Public Works Acceleration Act (P. L. 87-658).

17. Research projects, including conferences, communication activities and primate or other center grants (secs. 301, 303, 308, 624, Public Health Service Act, 42 U. S. C. 241, 242a, 242f, 291n; sec. 4, Federal Water Pollution Control Act, 33 U. S. C. 466c; sec. 3, Clean Air Act, 42 U. S. C. 1857b).

18. General research support (sec. 301 (d), Public Health Service Act, 42 U. S. C. 241).

19. Community health studies and demonstrations (sec. 316 Public Health Service Act, 42 U. S. C. 247a).

20. Mental health demonstrations and administrative studies (sec. 303 (a) (2), Public Health Service Act, 42 U. S. C. 242a).

21. Migratory workers health services (sec. 310, Public Health Service Act, 76 Stat. 592, P. L. 87-692, Sept. 25, 1962).

22. Intensive vaccination projects (sec. 317, Public Health Service Act, 42 U. S. C. 247b).

23. Tuberculosis and veneral disease control projects (current appropriation Act, P. L. 88-605).

24. Air pollution demonstration and survey projects and control programs (secs. 3 and 4, Clean Air Act, 42 U. S. C. 1857b, 1857c).

25. Water pollution demonstration grants (sec. 4 (a) (2), Federal Water Pollution Control Act, 33 U. S. C. 466c).

26. Health research training projects and fellowship grants (secs. 301, 433, Public Health Service Act, 42 U. S. C. 241, 289c).

27. Categorical (heart, cancer, air pollution, etc.) grants for training, traineeships or fellowships (secs. 303, 433, etc., Public Health Service Act, 42 U. S. C. 242a, 289c, etc.; sec. 3, Clean Air Act, 42 U. S. C. 1857b; sec. 4, Federal Water Pollution Control Act, 33 U. S. C. 466c).

28. Advanced professional nurse traineeships, improvement in nurse training and partial reimbursement to diploma schools of nursing (secs. 805, 806, 821, Public Health Service Act, 42 U. S. C. 296d, 296e, 297).

29. Grants to institutions for traineeships for professional public health personnel (sec. 306, Public Health Service Act, 42 U. S. C. 242d).

30. Grants to schools for specialized training in public health (sec. 309, Public Health Service Act, 242g),

31. Grants for special vocational rehabilitation projects (sec. 4, Vocational Rehabilitation Act, 29 U. S. C. 34).

32. Experimental, pilot or demonstration projects to promote the objectives of title I, IV, X, XIV, or XVI of the Social Security Act (sec. 1115, Social Security Act, 42 U. S. C. 1315).

33. Social security and welfare cooperative research or demonstration projects (sec. 1110, Social Security Act, 42 U. S. C. 1310).

34. Child welfare research, training or demonstration projects (sec. 526, Social Security Act, 42 U. S. C. 726).

35. Research projects relating to maternal and child health services and crippled children's services (sec 532, Social Security Act, 42 U. S. C. 729a).

36. Maternal and child health special project grants to institutions of higher learning (sec. 502 (b), Social Security Act, 42 U. S. C. 702 (b)).

37. Maternity and infant care special project grants to local health agencies (sec. 531, Social Security Act, 42 U. S. C. 726).

38. Special project grants to institutions of higher learning for crippled children's services (sec. 512 (b), Social Security Act, 42 U. S. C. 712 (b)).

39. Demonstration and evaluation projects and training of personnel in the field of juvenile delinquency (Juvenile Delinquency and Youth Offenses Control Act of 1961 (42 U. S. C. 2541, et seq.)).

40. Cooperative educational research (20 U. S. C. 331-332).

41. Language research (title VI, National Defense Education Act, 20 U. S. C. 512).

42. Research in new educational media (title VII, National Defense Education Act, 20 U. S. C. 541-542).

43. Research, training, and demonstration projects under Vocational Education Act of 1963 (sec. 4 (c), 20 U. S. C. 35c (c)).

44. Grants for research and demonstration projects in education of handicapped children (20 U. S. C. 618).

45. Training grants for welfare personnel (sec. 705, Social Security Act, 42 U. S. C. 906).

46. Allowances to institutions training graduate fellows or other trainees (title IV, National Defense Education Act, 20 U. S. C. 461-465; sec. 4, Vocational Rehabilitation Act, 29 U. S. C. 34; secs. 301, 433, etc., Public Health Service Act, 42 U. S. C. 241, 289 (c), etc.; sec. 3, Clean Air Act, 42 U. S. C. 1857b; sec. 4, Federal Water Pollution Control Act, 33 U. S. C. 466c).

47. Grants for teaching and the training of teachers for the education of handicapped children (20 U. S. C. 611-617).

48. Training persons in the use of films for the deaf (42 U. S. C. 2493 (b) (4)).

49. Training for teachers of the deaf (20 U. S. C. 671-676).

50. Research in the use of educational and training films for the deaf (42 U. S. C. 2493 (a)).

51. Operation and maintenance of schools in Federally-affected areas (20 U. S. C. 236-244).

52. Grants for teacher training and employment of specialists in desegregation problems (sec. 405, Civil Rights Act of 1964, P. L. 88-352).

53. Issuance to agencies or organizations of rent-free permits for operation, on Federal property in the custody of the Department, of vending stands for the blind, credit unions, Federal employee associations, etc. (Randolph-Sheppard Vending Stand Act, 20 U. S. C. 107-107f; 45 CFR Part 20; sec. 25, Federal Credit Union Act, 12 U. S. C. 1770; etc.)

54. Higher education student loan program (title II, National Defense Education Act, 20 U. S. C. 421-429).

55. Health professions school student loan program (title VII, Part C, Public Health Service Act, 42 U. S. C.

294; secs. 822-828, Public Health Service Act, 42 U. S. C. 297 a-g).

56. Land-grant college aid (7 U. S. C. 301-329).

57. Language and area centers (title VI, National Defense Education Act, 20 U. S. C. 511-513).

58. American Printing House for the Blind (20 U. S. C. 101-105).

59. Future Farmers of America (36 U. S. C. 271-291) and similar programs.

60. Science Clubs (20 U. S. C. 2 (note)).

61. Howard University (20 U. S. C. 121-131).

62. Gallaudet College (31 D. C. Code, Ch. 10).

63. Hawaii leprosy payments (sec. 331, Public Health Service Act, 42 U. S. C. 255).

64. Grants to schools of public health for provision of comprehensive training and specialized services and assistance (sec. 314 (c), Public Health Service Act, 42 U. S. C. 246 (c)).

65. Grants to agencies and organizations under Cuban Refugee program (22 U. S. C. 2601 (b) (4)).

66. Grants for construction of hospitals serving Indians (P. L. 85-151, 42 U. S. C. 2005).

67. Indian Sanitation Facilities (P. L. 86-121, 42 U. S. C. 2004a).

68. Areawide planning of health facilities (sec. 318, Public Health Service Act, 42 U. S. C. 247c).

69. Training institutes under sec. 511 of the National Defense Education Act of 1958, as amended (20 U. S. C. 491) and under title XI of such Act as added by P. L. 88-665 (20 U. S. C. 591-592).

Part 2. **State-administered continuing programs.**

1. Grants to States for control of venereal disease, tuberculosis, and for public health services (heart, cancer, mental health, radiological health, etc.) (sec. 314, Public Health Service Act (42 U. S. C. 246), and current appropriation act).

2. Grants to States for water pollution control (sec. 5, Federal Water Pollution Control Act, 33 U. S. C. 466d).

3. Grants to States for vocational rehabilitation services (sec. 2, Vocational Rehabilitation Act, 29 U. S. C. 32).

4. Grants to States for projects to extend and improve vocational rehabilitation services (sec. 3, Vocational Rehabilitation Act, 29 U. S. C. 33).

5. Designation of State licensing agency for blind operators of vending stands (Randolph-Sheppard Vending Stand Act, 20 U. S. C. 107-107f).

6. Grants to States for old-age assistance and medical assistance for the aged (title I, Social Security Act, 42 U. S. C. 301-306).

7. Grants to States for aid and services to needy families with children (title IV, Social Security Act, 42 U. S. C. 601-609).

8. Grants to States for aid to the blind (title X, Social Security Act, 42 U. S. C. 1201-1206).

9. Grants to States for aid to the permanently and totally disabled (title XIV, Social Security Act, 42 U. S. C. 1351-1355).

10. Grants to States for aid to the aged, blind or disabled or for such aid and medical assistance for the aged (title XVI, Social Security Act, 42 U. S. C. 1381-1385).

11. Grants to States for maternal and child health services (title V, part 1, Social Security Act, 42 U. S. C. 701-705).

12. Grants to States for services for crippled children (title V, part 2, Social Security Act, 42 U. S. C. 711-715).

13. Grants to States for special projects for maternity and infant care (sec. 531, Social Security Act, 42 U. S. C. 729).

14. Grants to States for child welfare services (title V, part 3, Social Security Act, 42 U. S. C. 721-725, 727, 728).

15. Grants to States for public library services and construction (20 U. S. C., sec. 351-358; P. L. 88-269).

16. Grants to States for strengthening science, mathematics, and modern foreign language instruction (title III, National Defense Education Act, 20 U. S. C. 441-444).

17. Grants to States for guidance, counseling and testing of students (title V-A, National Defense Education Act, 20 U. S. C. 481-484).

18. Grants to States for educational statistics services (sec. 1009, National Defense Education Act, 20 U. S. C. 589).

19. Surplus personal property disposal donations for health and educational purposes through State agencies (40 U. S. C. 484 (j)).

20. Grants to States for hospital and medical facilities (title VI, Public Health Service Act, 42 U. S. C. 291-291z).

21. Grants to States for community mental health centers construction (Community Mental Health Centers Act, 42 U. S. C. 2681-2688).

22. Grants to States for vocational education (Smith-Hughes Act, 20 U. S. C. 11-15, 16-28; George-Barden Act, 20 U. S. C. 15i-15q, 15aa-15jj, 15aaa-15ggg; Supplementary Acts, 20 U. S. C. 30-34.

23. Grants to States for mental retardation facilities (Part C, Mental Retardation Facilities Construction Act, 42 U. S. C. 2671-2677).

24. Arrangements with State vocational education agencies for training under the Area Redevelopment Act and the Manpower Development and Training Act of 1962 (42 U. S. C. 2513 (c), 2601, 2602).

25. Grants to States for comprehensive planning for mental retardation (title XVII, Social Security Act, 42 U. S. C. 1391-1394).

[F. R. Doc. 64-12539; Filed, Dec. 3, 1964; 4:23 p. m.]

APPENDIX E.

United States Court of Appeals
For the Fifth Circuit.

October Term, 1966.

No. 24,468.

D. C. Docket No. CA 67-19.

John W. Gardner, Secretary of the United States Department of Health, Education & Welfare,
Appellant,
versus
The State of Alabama, for and in Behalf of and as Trustee for the Department of Pensions and Security of the State of Alabama,
Appellee.

No. 24,561.

The State of Alabama, for and in behalf of and as Trustee for the Department of Pensions and Security of the State of Alabama,
Petitioner,
versus
John W. Gardner, Secretary of Health, Education and Welfare,
Respondent.

Appeal From the United States District Court for the Northern District of Alabama and on Petition for Review.

Before Gewin and Ainsworth, Circuit Judges, and West, District Judge.

Judgment.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and on Petition for Review, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order and judgment of the district Court granting a preliminary injunction is vacated and set aside, and that the order of the Secretary is enforced in accordance with the views expressed in the opinion of this Court.

August 29, 1967.

Issued as Mandate:

APPENDIX F.

Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d.-2000d-4 (78 Stat. 252-253):

Sec. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Sec. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the fail-

ure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Sec. 603. Any department or agency action taken pursuant to section 602 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 602, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 10 of the Administrative Procedure Act, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

Sec. 604. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

"(3) Any State which is dissatisfied with a final determination made by the Secretary on such a reconsideration or a final determination of the Secretary under section 4, 404, 1004, 1604, or 1904 may, within 60 days after it has

been notified of such determination, file with the United States Court of Appeals for the circuit in which such State is located a petition for review of such determination. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his determination as provided in Section 2112 of title 28, United States Code.

"(4) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the transcript and record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

"(5) The court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

"(b) For the purposes of subsection (a), any amendment of a State plan approved under title I, IV, X, XVI, or XIX, may, at the option of the State, be treated as the submission of a new State plan.

Section 404, Social Security Amendments of 1965, 42 U. S. C. 1316 (79 Stat. 419):

"Sec. 1116. (a) (1) Whenever a State plan is submitted to the Secretary by a State for approval under title I, IV, X, XIV, XVI, or XIX, he shall, not later than 90 days after the date the plan is submitted to him, make a determination as to whether it conforms to the requirements for

approval under such title. The 90-day period provided herein may be extended by written agreement of the Secretary and the affected State.

"(2) Any State dissatisfied with a determination of the Secretary under paragraph (1) with respect to any plan may, within 60 days after it has been notified of such determination, file a petition with the Secretary for reconsideration of the issue of whether such plan conforms to the requirements for approval under such title. Within 30 days after receipt of such a petition, the Secretary shall notify the State of the time and place at which a hearing will be held for the purpose of reconsidering such issue. Such hearing shall be held not less than 20 days nor more than 60 days after the date notice of such hearing is furnished to such State, unless the Secretary and such State agree in writing to holding the hearing at another time. The Secretary shall affirm, modify, or reverse his original determination within 60 days of the conclusion of the hearing.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 752

THE STATE OF ALABAMA, FOR AND IN BEHALF OF AND AS TRUSTEE FOR THE DEPARTMENT OF PENSIONS AND SECURITY OF THE STATE OF ALABAMA, PETITIONER

v.

JOHN W. GARDNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR SECRETARY GARDNER IN OPPOSITION

OPINIONS BELOW

The order of the district court (Pet. 37–46) is unreported. The opinion of the court of appeals (Pet. 73–97) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1967. On September 25, 1967, the court of appeals stayed its mandate, and the stay is effective until final disposition of the case by this Court. The petition for a writ of certiorari was filed on Oc-

282-645

tober 21, 1967. The jurisdiction of this Court is invoker under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly based its jurisdiction upon the State's petition for direct review, rather than upon Secretary Gardner's appeal from the order of the district court.

2. Whether the court of appeals was correct in sustaining the validity of the Department of Health, Education, and Welfare regulation which requires recipients to agree to take action designed to eliminate discrimination in federally assisted programs.

STATUTE AND REGULATION INVOLVED

The provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d–2000d–4, and the implementing regulation of the Department of Health, Education, and Welfare (45 C.F.R. Part 80) are reprinted in the petition (Pet. 134–135 and 98–131).

STATEMENT

This controversy involves the validity of a regulation of the Department of Health, Education, and Welfare, issued pursuant to Title VI of the 1964 Civil Rights Act, that requires the Alabama Department of Pensions and Security to assume responsibility for eliminating racial discrimination in its welfare program as a condition of continuing to receive federal financial assistance. The pertinent facts, which are set forth fully in the opinion of the court of appeals (Pet. 74–81), may be summarized as follows:

Under the HEW regulation, every State applying

for federal financial aid to a continuing program must submit a statement of compliance which (1) indicates the extent to which the State program complies with the regulation and (2) provides for methods of administration which give reasonable assurance that existing failures to comply will be corrected.[1] By August of 1965, every State, with the exception of Alabama, had submitted an acceptable statement of compliance with respect to its federally assisted welfare programs.

Representatives of HEW made an extensive effort to bring about voluntary compliance by the Alabama Department with the requirement in question. When these efforts failed, HEW initiated administrative proceedings against the Alabama Department because of its failure to comply with the regulation.[2] After a full evidentiary hearing conducted in accordance with the Administrative Procedure Act, the hearing examiner determined that Alabama had failed to furnish an adequate statement of compliance. The examiner recommended that financial aid to Alabama under the

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[1] This requirement is contained in § 80.4(b) of the regulation, (Pet. 105). The programs involved in this litigation are continuing State programs within the meaning of the regulation.

[2] On August 20, 1965, after receiving HEW's formal notice of its inability to obtain compliance by voluntary means, the Commissioner of the Alabama Department of Pensions and Security sent to HEW a letter which he described as a "statement of * * * compliance with Title VI * * *." On August 27, 1965, HEW informed the Alabama Department that its statement failed to meet the minimum standards of the regulation. The Secretary so determined in the administrative proceedings and the court of appeals sustained his decision.

programs in question[3] be terminated and that recommendation was adopted by the Commissioner of Welfare. On January 12, 1967, Secretary Gardner approved the Commissioner's decision and ordered the termination of payments to Alabama, effective February 28, 1967 (Pet. 47–72). Pursuant to Section 602 of Title VI, the order of the Secretary was transmitted to the appropriate congressional committees.

On January 13, 1967, invoking § 10 of the Administrative Procedure Act, 5 U.S.C. (Supp. II) 703, and 28 U.S.C. 1331, Alabama filed suit in the United States District Court for the Northern District of Alabama challenging Secretary Gardner's order and the underlying regulation. The government moved to dismiss for lack of jurisdiction, but, on February 3, 1967, the district court granted a preliminary injunction against enforcement of the Secretary's order. Secretary Gardner filed a timely notice of appeal.

On February 18, 1967, the State of Alabama filed in the United States Court of Appeals for the Fifth Circuit a petition for direct review of the Secretary's order. This petition was based upon 42 U.S.C. (Supp. II) 1316 and § 603 of the 1964 Civil Rights Act, 42 U.S.C. 2000d–2. Alabama continued to assert the jurisdiction of the district court, but, in the alternative,

[3] The affected programs (and their statutory bases) are the following: Old Age Assistance, Title I of the Social Security Act, 42 U.S.C. 301–306; Aid and Services to Needy Families With Children, Title IV, 42 U.S.C. 601–609; Child-Welfare Services, Title V, part 3, 42 U.S.C. 721–728; Aid to the Blind, Title X, 42 U.S.C. 1201–1206; and Aid to the Permanently and Totally Disabled, Title XIV, 42 U.S.C. 1351–1355.

sought such review as to four of the five programs if the court of appeals had sole jurisdiction.

The appeal and the petition for direct review were consolidated and set down for expedited consideration. On August 29, 1967, the court of appeals rendered a unanimous decision holding that it had exclusive jurisdiction to review the Secretary's action with respect to each of the five programs, and sustaining the validity of the HEW regulation and the decision of Secretary Gardner.

ARGUMENT

Alone among the 50 States, Alabama refused to file a statement of its willingness to comply with the nondiscrimination requirements imposed by Title VI of the Civil Rights Act of 1964 with respect to the administration of federally assisted welfare programs. The regulations of the Department of Health, Education, and Welfare, approved by the President, require such a statement and expressly make refusal to file it a basis for termination of federal assistance. The court of appeals was clearly correct in sustaining the regulation and Secretary Gardner's order terminating federal assistance for failure to comply with it. While we believe the ruling below on the jurisdictional issue was also correct, that question can in no event affect the outcome of the litigation since the court of appeals concededly had jurisdiction to review the administrative decision. There is, accordingly, no occasion for further review by this Court.

1. Petitioner relies primarily (Pet. 26–34) upon its contention that the proper forum for initial review

of Secretary Gardner's order was the district court, rather than the court of appeals upon the petition for direct review. The relevant statutes clearly provide for exclusive review by the court of appeals of administrative action with respect to four of the five programs involved.[4] The argument is, however, that because the Secretary's order also affects a related program not expressly covered by the review provisions, the whole of the order is subject to challenge in the district court. The court of appeals, on the other hand, concluded that the express grant of power to review four programs implies a like jurisdiction with respect to the fifth. We believe that ruling is correct. But, at all events, the question is of no consequence here since the court of appeals was also seized of the appeal from the district court's decision and might have rendered the same judgment under that caption.

2. Secretary Gardner's order was based upon his determination that Alabama had failed to satisfy the requirement, imposed by the HEW regulation, that the State furnish an adequate statement of compli-

[4] Section 603 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d–2, provides in pertinent part: "Any department or agency action taken pursuant to section 602 shall be subject to such judicial review as may otherwise be provided by law for similiar action taken by such department or agency on other grounds." In turn, Section 1116(a)(3) of the Social Security Act, as amended, 42 U.S.C. (Supp. II) 1316(a)(3), provides that "Any States which is dissatisfied" with administrative action under specified title of the Act—including those covering four of the five programs here involved—may "file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination."

ance [5] with the obligation to operate federally assisted programs on a nondiscriminatory basis. The duty to file an acceptable plan which meets the conditions imposed by federal statutes and regulations is traditional in federal-State welfare programs and is fully authorized by Section 602 of the Civil Rights Act, 42 U.S.C. 2000d–1 (Pet. 134).[6] Indeed, it is an implementation technique expressly contemplated by Congress.[7] There is, accordingly, no basis for a broadside attack on the regulation or the order.

The primary objection which Alabama has raised pertains to the requirement that the statement of compliance covers not only State instrumentalities, but also "third parties" who provide services as part of the federally assisted welfare programs.[8] The Alabama De-

[5] Section 80.8 of the regulation (Pet. 112) provides that, in the event of a failure to provide an assurance required under § 80.4 (Pet. 103), federal financial assistance may, after appropriate proceedings, be refused.

[6] Each of the federal departments which adopted regulations implementing Title VI included a requirement that an assurance be given as a condition for the grant or continuation of federal aid. See, *e.g.*, 32 C.F.R. § 300.6 (Department of Defense); 7 C.F.R. § 15.4 (Department of Agriculture).

[7] During the congressional debate on Title VI, it was recognized that requiring written assurances or statements of compliance would be an appropriate means of administration. See, *e.g.*, 110 Cong. Rec. 7059 (April 7, 1964) (remarks of Senator Pastore).

[8] Section 80.3 of the regulation (Pet. 100) prohibits recipients (here, the State) from discriminating "directly or through contractual or other arrangements." Secton 80.5(a) (Pet. 107) states, by way of illustration, that the probitition against discrimination extends to "services purchased * * * [by the state] from hospitals, nursing homes, schools, and similar institutions * * * and to the facilities in which such services are provided * * *."

partment refused to assume any responsibility with respect to eliminating from the federally assisted programs discrimination which results from the action of these third parties. But, as the court of appeals held, there was no legal basis for this refusal. In implementing Title VI, HEW was entitled to ask Alabama to make a good faith effort to eliminate racial discrimination in all aspects of its statewide federally assisted welfare program, which includes those services and facilities provided by third parties. The good faith effort which the regulation requires would, of course, include persuasion and negotiation with the third parties; and where discrimination cannot be ended promptly by negotiation, it would also include elimination of the discrimination by substituting the use of other facilities for those of the discriminating party. As the court of appeals noted, Secretary Gardner's opinion properly required that, when nondiscrimination cannot be achieved through persuasion, "Alternate, acceptable services should be found and developed" (Pet. 93).

Alabama's refusal to comply with the regulation required the Secretary to invoke, as a last resort, the sanction of terminating assistance. A full test of the order and of the underlying regulation has been concluded, in administrative and judicial proceedings. We

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Alabama asserts that the termination order should have made an exception for the parts of the welfare programs which do not involve third-party services. This assertion overlooks the fact that, although Secretary Gardner's order (Pet. 70–71) expressly urged submission of an adequate statement regarding at least the direct-payment aspects of the programs, the State failed to do so.

submit the time has come to end the debate. Alabama will then be free to submit the required statement and prevent the withholding of funds from welfare recipients, as it has repeatedly announced it would if the regulation is upheld.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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NOVEMBER 1967.

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